Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ANN TENISON HEREFORD WEBB, LIZANN TENISON WEBB, BYRON JAMES WEBB, AND CAMILLE ELIZABETH WEBB SEWELL, PETITIONERS

v.

THE CITY OF DALLAS, TEXAS, THE CITY OF DALLAS PARKS & RECREATION DEPARTMENT, THE CITY OF DALLAS PARKS & RECREATION BOARD, and PAUL DYER, DIRECTOR, CITY OF DALLAS PARKS & RECREATION DEPARTMENT,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Court of Appeals exceed its *Erie* authority by creating Texas law relative to complex and unsettled real estate law issues and deed interpretation, and Texas Probate law, with regard to descent and distribution and will construction?

2. In this diversity action brought in the Northern District of Texas, governed by Texas law, should the Court of Appeals have certified the decisive issues of law upon which the case was decided to the Supreme Court of Texas, pursuant to Texas' statutory certification procedure, to permit the Supreme Court of Texas to decide whether the Court of Appeals' decision, based on two novel rules of deed and will construction, would become the law of Texas, in a situation where Texas' interests are vital and paramount?

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NO._____

In The
SUPREME COURT OF THE UNITED STATES

October Term, 2005

ANN TENISON HEREFORD WEBB, ET AL
Petitioners,

vs.

THE CITY OF DALLAS, ET AL

PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, **ANN TENISON HEREFORD WEBB, LIZANN TENISON WEBB, BYRON JAMES WEBB, AND CAMILLE ELIZABETH WEBB SEWELL,** respectfully request that a writ of *certiorari* be issued to review the Judgment of the United States Court of Appeals for the Fifth Circuit which affirmed the judgment of the United States District Court for the Northern District of Texas, Dallas Division.

OPINIONS BELOW

The Court of Appeals affirmed the Judgment of the United States District Court for the Northern District of Texas, Dallas Division, on August 17, 2005. (App. 1a). Petitioners timely filed a Petition for Rehearing on August 30, 2005. The Court of Appeals denied the Petition for Rehearing on November 10, 2005. (App. 11a).

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. Section 1254. The district court had jurisdiction of the case pursuant to 28 U.S.C. Section 1332(a).

RELEVANT PROVISIONS INVOLVED

28 U.S.C. § 1332(a):

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between--
>
> (1) citizens of different States;
>
> (2) citizens of a State and citizens or subjects of a foreign state;
>
> (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

Vernon's Ann.Texas Const. Art. V, § 3-c

Jurisdiction to answer questions of state law certified from federal appellate court

Sec. 3-c. (a) The supreme court and the court of criminal appeals have jurisdiction to answer questions of state law certified from a federal appellate court.

(b) The supreme court and the court of criminal appeals shall promulgate rules of procedure relating to the review of those questions.

Texas Rule of Appellate Procedure 58:

58.1. Certification

The Supreme Court of Texas may answer questions of law certified to it by any federal appellate court if the certifying court is presented with determinative questions of Texas law having no controlling Supreme Court precedent. The Supreme Court may decline to answer the questions certified to it.

58.2. Contents of the Certification Order

An order from the certifying court must set forth:

(a) the questions of law to be answered; and

(b) a stipulated statement of all facts relevant to the questions certified, showing fully the nature of the controversy in which the questions arose.

TEX. PROBATE CODE ANN. § 3(o) (Vernon 1980):

§ 3. Definitions and Use of Terms

Except as otherwise provided by Chapter XIII of this Code, when used in this Code, unless otherwise apparent from the context:

...

(o) "Heirs" denote those persons, including the surviving spouse, who are entitled under the statutes of descent and distribution to the estate of a decedent who dies intestate.

TEX. PROBATE CODE ANN. § 38 (Vernon 1980):

§ 38. Persons Who Take Upon Intestacy

(a) Intestate Leaving No Husband or Wife. Where any person, having title to any estate, real, personal or mixed, shall die intestate, leaving no husband or wife, it shall descend and pass in parcenary to his kindred, male and female, in the

following course:

1. To his children and their descendants.

...

STATEMENT

Petitioners, Ann Tenison Hereford Webb, Lizann Tenison Webb, Byron James Webb, and Camille Elizabeth Webb Sewell (collectively the "Webbs") appealed the district court's take-nothing judgment with respect to their claims against the City of Dallas. The Webbs asserted that the City violated conditions contained in deeds conveying property to the City which provided:

> "And if said property, or any part thereof, shall not be used by said City, or its successors as such municipal corporation, for the purposes of a Public park, or if said property, or any part thereof, shall be used for any purpose other than public park purposes as above provided for, or should the name of said park be changed from that above designated, then and in each such event the right and title of the City of Dallas to the property hereby granted shall cease, and said property and all right and title thereto shall at once revert to and vest ***in us or our heirs***, and it shall be lawful for ***us or our heirs*** to re-enter upon, take, repossess and enjoy all and singular the property hereby granted as in our former estate." [Emphasis added].

Petitioners alleged that they were "heirs" under the deeds and under Texas state law. A jury found to the

contrary, and the district court entered judgment based on this jury finding.

The factual background of this case is set forth at length in a prior opinion of the Court of Appeals. *See Webb v. City of Dallas*, 314 F.3d 787, 788-90 (5th Cir.2002)(on interlocutory appeal)["*Webb I*"]. (App 23a).

The crux of Petitioner's appeal, germane to this Petition, was the propriety of the district court's submission of Question One to the jury. Question One (App. 17a) inquired whether the Webbs "prove[d] that in the Tenison Deeds, the grantors, Edward O. and Annie M. Tenison, clearly intended to refer to the [Webbs] by the use of the word 'heirs'?" The court instructed the jury to answer "Plaintiffs did prove," or "Plaintiffs did not prove." In the event that the jury chose the latter answer, they were instructed to stop and answer no further questions. Following seven days of deliberations, the jury answered Question One by marking "Plaintiffs did not prove." Upon consideration of the verdict, the court entered a take-nothing judgment against the Webbs.

The Court of Appeals found that the district court committed plain error by submitting Question One to the jury. (App. 7a). Yet, the Court went on to determine, *sua sponte*, that the property interest created by the Tenison Deeds created a fee simple interest in the land subject to a condition subsequent that the City maintain the property as a public park. Thus, the Court concluded, without citation to any controlling Texas authority:

> "This property interest was passed from the Tenisons to their surviving children by operation of the residuary clauses of their wills. Importantly, these wills did not transfer the right of re-entry to the Webbs' ancestor who predeceased the Tenisons."

(App. 6a).

The Court of Appeals also rejected Petitioners' contention that the deeds conveyed to the Tenison "heirs" an executory interest in the property. Under Petitioners' theory, by the use of the term "heirs" in the Tenison deeds, the Tenisons intended the term to include their lineal descendants so that the restrictive covenants in the deeds would be enforceable for all time. Because the Tenisons intended the deeds to operate separately and independently from their wills, Petitioners argued that the reversionary interest did not pass through the line of testamentary succession under the Tenison wills. The Court of Appeals rejected this argument, holding, as a matter of Texas law, that such a construction of the deeds would violate the Rule Against Perpetuities.

The Court of Appeals created new Texas law by holding:

> "This conveyance is impermissible as it contravenes the rule against perpetuities, which provides that "no interest is valid unless it must vest, if at all, within twenty-one years after the death of some life or lives in being at the time of the creation of the interest." [fn omitted] When the deeds were executed, the City could have maintained the land

> as a public park for an indefinite period of time. Thus, it was possible at the time the deeds were made that the lineal descendants of the Tenisons alive when the City ceased using the property as a public park would not be determined until well after the perpetuities period ended. Under Texas law, if a deed is equally open to two constructions, "effect will be giver to the construction which renders the agreement valid rather than void." [fn omitted]Thus, the Webbs' proffered interpretation of the deed must be rejected. Further, no alternative interpretation of the deeds that would vest rights in the Webbs is available."

(App. 6a-7a). Thus, the Court of Appeals concluded:

> Because the word "heirs" in the deeds cannot, as a matter of law, refer to the Webbs, the district court committed plain error by submitting Question One to the jury. However, the district court's take-nothing judgment is correct as a matter of law for this very reason. Further, to the extent that the court omitted any necessary factual issue in the jury instructions, we deem the court to have made such a finding in accord with the judgment. [FN omitted]. Accordingly, we conclude that the district court's submission of Question One to the jury, while erroneous, did not affect the Webbs' substantial rights. [FN omitted].

(App. 7a). In essence, the Court of Appeals, without citation to any definitive Texas authority, created new Texas law in the following particulars:

1. The Tenisons' reversionary interest under the

two deeds passed only under the residuary clauses of the Tenisons' wills, thus not to Petitioners; and

2. The use of the term "heirs" in the Tenison deeds violated the Rules against Perpetuities, presumably under Texas law.

Thus, the Court of Appeals concluded, the submission of issue No 1 to the jury did not affect the substantial rights of Petitioners since the Webbs' proffered interpretation of the deeds was rejected by the Court of Appeals, as a matter of law, and no alternative interpretation of the deeds is available that would vest rights in the Webbs.

REASONS FOR GRANTING THE PETITION

There are special and important reasons for granting the writ of certiorari in this case. The district court had jurisdiction of this matter solely on the basis of diversity of citizenship, 28 U.S.C. § 1332(a)(1). The Court of Appeals exceeded its authority under *Erie v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), by creating, rather than applying, important questions of substantive Texas state law regarding deed construction and the law of descent and distribution, contrary to the common law of Texas and the Texas Probate Code.

While the Court of Appeals found error in the district court's submission of the case to the jury as to the interpretation of the word "heirs" used in the Tenison deeds, the Court of Appeals went further, and determined, *sua sponte*, that the district court's judgment was correct in denying Petitioners the relief

they prayed for, by declaring what Texas law is in two areas that had not been determined by the district court. In doing so, the Court of Appeals misapplied Texas state law regarding deed interpretation, the laws of descent and distribution, and the independent operation of the deeds, separate and apart from the Tenison wills. Thus, the Court of Appeals exceeded its *Erie* authority by declaring what Texas state law is in areas that had not previously been settled by Texas courts.

After the Court of Appeals exceeded its *Erie* authority, and decided these important, complex questions of Texas real estate and probate law, on petition for rehearing, the Court of Appeals refused to certify these important questions to the Texas Supreme Court, as authorized under the Texas Constitution and Texas Rules of Appellate Procedure. *See* Texas Const. Art. V, § 3-c; Texas Rule of Appellate Procedure 58.

Petitioners' Questions should be reviewed by this Court because the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings in a diversity of citizenship case, contrary to *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) and *Salve Regina College v. Russell*, 499 U.S. 225, 111 S.Ct. 1217, 1225, 113 L.Ed.2d 190 (1991), as to call for an exercise of this Court's supervisory power. Rule 10(a) & (c), Supreme Court Rules.

A. The District Court history.

Early in the district court litigation, Respondents filed their motion for summary judgment

or, alternatively, for judgment on the pleadings. See *Webb v. City of Dallas*, 2001 U.S. Dist. LEXIS 16054 (Findings And Recommendations of the United States Magistrate Judge – October 4, 2001)(App. 44a). Respondents contended, among other things, that Petitioners lacked standing to enforce the Tenison deed restrictions because they are not the legal heirs of Edward O. and Annie M. Tenison, and thus have no legal interest in the Tenison Park property. *See id.* at 7 (App. 44a).

To better understand this argument, the district court, through the Magistrate's Findings and Recommendations, traced the Tenison lineage through which Petitioners claimed their right to enforce the deed restrictions:

> "Edward O. and Annie M. Tenison had four children. Their son, Edward Hugh Tenison, predeceased his parents. Edward Hugh Tenison was survived by two children, Elizabeth Ann Tenison and Edward Hugh Tenison, Jr. Elizabeth Ann Tenison was the grandmother [sic] of Ann Tenison Hereford Webb and the great-grandmother [sic] of Lizann Tenison Webb, Camille Elizabeth Webb Sewell, and Byron James Webb--the four plaintiffs in this suit. (Def. MSJ Jt. App., Exh. 1).
>
> When Edward O. Tenison died in 1924, he bequeathed $ 25,000 to each of his three living children--Mrs. Cruger T. Smith, Mrs. Dan M. Craddock, and James C. Tenison. (*Id.*, Exh. 12, P III). The will also created separate trusts in the amount of $ 25,000 for each of his three

grandchildren, including Elizabeth Ann Tension, plaintiffs' direct ancestor. (*Id.*, Exh. 12, P II). Edward left the "rest, residue and remainder" of his estate to his wife, Annie M. Tenison. (*Id.*, Exh. 12, P IV). Annie died in 1927. Her will provides, in relevant part:

> Fully aware that my beloved deceased husband, Edward Oliver Tension, provided amply for our grandchildren in bequests in trust to the City National Bank, Dallas, Texas, being the sum of $ 25,000.00 each, namely Edward O. Tenison 2nd, Elizabeth Ann Tenison and Edward Hugh Tenison, I only mention them as follows:
>
> I give, devise and bequeath to the City National Bank of Dallas, Texas, and to its corporate successor, being a national bank, the sum of $ 10,000.00 to be held in two separate trusts as follows, to wit:
>
> (1) $ 5,000.00 of said sum in trust for the sole use and benefit of my beloved granddaughter, Elizabeth Ann Tenison;
>
> (2) $ 5,000.00 of said sum for the sole use and benefit of my beloved grandson, Edward Hugh Tenison ...
>
> ****
>
> It is my wish that a portion of my personal jewelry be distributed amongst my granddaughters, as a keepsake, but I leave the distribution of same wholly in the hands of my executres and/or executor herein appointed, as they think suitable.

> *All the rest, residue and remainder of the property of which I may die seized or possessed, or to which I may be entitled at the time of my death, whether real, personal or mixed, and wheresoever situated, I give, devise and bequeath to my beloved children, Mrs. Cruger T. Smith, Mrs. Dan M. Craddock and James Charles Tenison.*

(*Id.*, Exh. 2, PP 2-4) (emphasis added). As neither of the Tenison wills specifically mentions the reversionary interest in the deeds, defendants contend that this interest passed to Mrs. Cruger T. Smith, Mrs. Dan M. Craddock, and James Charles Tenison along with the "rest, residue and remainder" of Annie M. Tenison's estate. None of the plaintiffs are direct descendants of these beneficiaries. Therefore, defendants maintain that plaintiffs are not "heirs" of the Tenison estate and cannot enforce the deed restrictions."[1]

Plaintiffs counter that the term "heirs," as used in the Tenison deeds, is not so limited. They contend that the Tenisons intended the term to include their lineal descendants so the restrictive covenants in the deeds would be enforceable for all time. Because the Tenisons intended the deeds to operate separately from their wills, plaintiffs argue that the reversionary interest did not pass through the line of testamentary succession.

---

[1] Findings and Recommendations of the United States Magistrate Judge, *Webb v. City of Dallas*, *2001 U.S. Dist. LEXIS 16054* (October 4, 2001)(App. 44a).

This argument is supported by Texas law. At common law, the term "heirs" generally referred to "that class of persons who by inheritance take in succession from generation to generation." *Barmore v. Darragh, 231 S.W. 472, 478* (Tex. Civ. App.--San Antonio 1921), *rev'd on other grounds, 242 S.W. 714 (Tex. Comm. App. 1922).* The Texas Property [sic] Code defines "heirs" as "those persons ... who are entitled under the statutes of descent and distribution to the estate of a decedent who dies intestate." TEX. PROP.[sic] CODE ANN. § 3(o) (Vernon 1980). The term has even been used to refer to "children," if the context of the document and the surrounding circumstances indicate that such usage was intended. *See Federal Land Bank of Houston v. Little, 130 Tex. 173, 107 S.W.2d 374, 376-77 (Tex. Comm. App. 1937); Texas Co. v. Meador, 250 S.W. 148, 149-50 (Tex. Comm. App. 1923).* ***However, the Court has found no case in which term "heirs" has been used to refer to persons who take under a valid will. A person who dies leaving a will disposing of his entire estate may have devisees, legatees or assigns, but he does not have "heirs." See Buckner Orphans Home v. Berry, 332 S.W.2d 771, 775-76 (Tex. Civ. App.--Dallas 1960, writ ref'd n.r.e.) (where decedent left a valid will, appellees had no interest that would entitle them to seek a declaration of heirship without first having the will annulled). The fact that the deeds were executed three months after Edward O. Tenison executed his will further supports plaintiffs' argument, as it suggests that the Tenisons knew they had no "heirs" in the technical sense. [fn omitted].***

[Emphasis added].

Defendants also challenge plaintiffs' interpretation of the deeds on a variety of other grounds. Some of these arguments simply mention various rules of construction or policy considerations against restraints on alienation. (Def. MSJ Br. at 16-17). Others invoke such arcane yet enduring principles as shifting and springing executory interests, fee simple defeasible and determinable, the ***Rule Against Perpetuities***, the Doctrine of Worthier Title, and the Rule in Shelley's Case. (*Id.* at 17-19). Despite the nostalgia these arguments inspire for first-year law school, they need not be addressed in the absence of more thorough briefing by the defendants. *See In re Hunt, 124 B.R. 200, 210 n.11 (N.D. Tex. 1991)* (Fitzwater, J.). [Emphasis added].

...

This Court cannot say as a matter of law that the Tenisons intended to use the term "heirs" in the manner suggested by defendants. Having executed his will just three months before the conveyances at issue, Edward O. Tenison arguably knew that he had no "heirs" in the technical sense. Moreover, the deeds themselves provide that the Tenison Park properties "shall *always* be used by the City of Dallas for the purposes of a public park," and purport to make the restrictive covenants enforceable against the "City *or its successors*." (Def. MSJ Jt. App., Exhs. 9 & 10) (emphases added). This language seems to indicate that the Tenisons intended the term "heirs" to denote a broader class of persons who could enforce the deed restrictions down through the

> generations. ***Were the Court to accept defendants' argument, only those persons who were alive when the Tenisons died would have standing to enforce the covenants. It is questionable whether the Tenisons intended such a self-defeating result.***
>
> The Court determines that there are genuine issues of material fact as to whether plaintiffs are the "heirs" of Edward O. and Annie M. Tenison, as that term is used in the Tenison deeds. Accordingly, defendants are not entitled to summary judgment." [Emphasis added].

(App. 51a-55a).

B. *Webb I* before the Court of Appeals.

The Respondent City of Dallas appealed the district court's order denying its motion. *See Webb v. City of Dallas*, 314 F.3d 787 (5th Cir. 2002)(App. 23a). Respondents asserted the same arguments advanced in the district court in contending that Petitioners lacked Article III standing to maintain their suit. The Fifth Circuit rejected Respondents' contentions in holding:

> In response to the City's motion for summary judgment that the Webbs do not possess a right to enforce the deed restrictions as "heirs" when the residuary clause in Annie M. Tenison's will left the "rest, residue and remainder" of her property to her three children, the district court found that "genuine issues of material fact as to whether plaintiffs are the 'heirs' of Edward O. and Annie M. Tenison, as that term is used in the Tenison deeds,"

precluded summary judgment. ***On appeal, we are not called upon to review the merits of the district court's summary judgment determination regarding the Webbs' alleged ownership rights.*** Rather, in order to review the discrete sovereign immunity question on appeal, we must only determine that the minimum constitutional requirements for standing are satisfied.

The Webbs are not direct descendants of the named beneficiaries of the residuary clause of Annie M. Tenison's will. Moreover, neither of the Tenison wills specifically references the future interest created by the Tenison Park conveyances to the City. Nevertheless, in their First Amended Complaint, the Webbs have undoubtedly asserted an interest in this property dispute sufficient to satisfy the injury-in-fact jurisdictional requirement of the Article III standing doctrine.

Here, the Webbs have asserted a "personal stake" in the dispute that is concrete and particularized. [FN9 – omitted]. As alleged, the conduct of the City in violating the deed restrictions has affected the Webbs in a personal, individual and particularized way because as "heirs" under the deeds, they have a personal stake in seeing that the City adheres to the restrictions on the use of the Tenison property. [FN10 – omitted].

The Webbs may ultimately fail to prove ownership or any property interest entitlement to the Tenison property. Facially, however, the First Amended Complaint (including its reference to the express

language of the relevant deeds) avers that the Webbs suffered a concrete constitutional injury-in-fact by the City's failure to operate the Tenison property in accordance with the deed restrictions and that through the express conveyance of a fee simple subject to a condition subsequent, the Webbs can now redress this injury by exercising their right of reentry as "heirs." FN11 These allegations assert an interest in the property dispute sufficient to meet the minimum constitutional requirements of Article III.

[Emphasis added].

FN11. *See Lawyers Trust Co. v. City of Houston*, 359 S.W.2d 887, 890 (Tex.1962) (discussing the characterization of a fee simple determinable and a fee simple subject to a condition subsequent); *Gutierrez v. Rodriguez*, 30 S.W.3d 558, 560 (Tex.App.Texarkana 2000, no pet.).

C. The Court of Appeals' duties under *Erie v. Tomkins*.

Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), mandates that a federal court sitting in a diversity case apply the substantive law of the forum State, absent a federal statutory or constitutional directive to the contrary. 304 U.S., at 78, 58 S.Ct., at 822. See also 28 U.S.C. § 1652 ("The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply"). In decisions after

Erie, this Court made clear that state law is to be determined in the same manner as a federal court resolves an evolving issue of federal law: "with the aid of such light as [is] afforded by the materials for decision at hand, and in accordance with the applicable principles for determining state law." *Meredith v. Winter Haven*, 320 U.S. 228, 238, 64 S.Ct. 7, 13, 88 L.Ed. 9 (1943). See also *Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202, 208-209, 58 S.Ct. 860, 862, 82 L.Ed. 1290 (1938) ("Application of the 'State law' to the present case ... does not present the disputants with duties difficult or strange"). Erie does not permit a circuit court to create otherwise non-existent or non-definitive state law. *See Herrmann Holdings Ltd.; v. Lucent Technologies*, 302 F.3d 552, 558 (5th Cir. 2002)("As our jurisdiction in this case is based on diversity of citizenship, we have a duty to apply Texas law. *See Erie R. Co. v. Tompkins*, 304 U.S. 64, 79-80, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). The Texas Supreme Court has not yet ruled on the enforceability of best efforts clauses in breach of contract actions. Accordingly, in deciding this case, we are required to make an *Erie* guess as to what the Texas Supreme Court would most likely decide. *Barfield v. Madison County, Miss.*, 212 F.3d 269, 271-72 (5th Cir.2000). Our task is to "attempt to predict state law, not to create or modify it." *United Parcel Service, Inc. v. Weben Indus., Inc.*, 794 F.2d 1005, 1008 (5th Cir.1986)").

D. Certification of State Law issues

The Court of Appeals concluded that Texas state law is that executory interests reserved in deeds creating a right of reversion are the exclusive property of a testator's estate that pass soley to the legatees

under a Texas will. No Texas case has so decided. Certainly no Texas case has decided these important questions of Texas law which were utilized by the Court of Appeals in affirming the district court's judgment in this case. While it is clear that Texas law was controlling on the issues, the district court found none that was decisive, and the Court of Appeals cited no Texas cases determinative of the crucial question: whether the Tenison deeds operated independently of the Tenison wills, such that the Petitioners' were "heirs" under the Tenison deeds under Texas law.

On petition for rehearing, Petitioners requested that the Court of Appeals certify the state-law questions upon which the Circuit Court's decision rested, to the Texas Supreme Court. Without comment, the petition for rehearing was denied. The avenue of certification is open to this Court, *see Aldrich v. Aldrich*, 375 U.S. 249, 84 S.Ct. 305, 11 L.Ed.2d 304 (1963); *Dresner v. City of Tallahassee*, 375 U.S. 136, 84 S.Ct. 235, 11 L.Ed.2d 208 (1963), and to the Fifth Circuit, which has used it before. *See Trail Builders Supply Co. v. Reagan*, 430 F.2d 828 (5th Cir. 1970); *Gaston v. Pittman*, 413 F.2d 1031 (5th Cir. 1969); *Martinez v. Rodriquez*, 410 F.2d 729 (5th Cir. 1969); *Moragne v. States Marine Lines, Inc.*, 409 F.2d 32 (5th Cir. 1969), *rev'd on other grounds*, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970); *Hopkins v. Lockheed Aircraft Corp.*, 394 F.2d *656* (5th Cir.. 1968); *Life Ins. Co. of Virginia v. Shifflet*, 380 F.2d 375 (5th Cir..1967); *Green v. American Tobacco Co.*, 325 F.2d 673 (5th Cir. 1963); *Sun Insurance Office v. Clay*, 319 F.2d *505* (5th Cir. 1963). The Fifth Circuit's willingness to certify is in part a product of frequent state court repudiation of its interpretations of state law. *See* the cases summarized

in *United Services Life Ins. Co. v. Delaney*, 328 F.2d 483, 486--487 (5th Cir. 1964) (Brown, C.J., concurring).

Here, resort to certification would seem particularly appropriate in view of the novelty and complexities of the question decided by the Court of Appeals, and the relatively great unsettlement and confusion of Texas law regarding the inter-relationship between stand-alone deeds, and separate wills which do not mention any reversionary interest under the formerly executed deeds of conveyance.

E. The Court of Appeals' *sua sponte* powers

Essentially, the Court of Appeals, addressing a jury submission issue, transformed its analysis into a *sua sponte* ruling on the Respondent's Motion for Summary Judgment, which had been previously denied by the district court, and which was not presented to the Court of Appeals by way of cross-appeal by Respondents. An appellate court's *sua sponte* powers to decide cases on the merits is very limited. For example, although Article III constitutional standing is not raised by the parties or considered by the district court, the Court of Appeals must--where necessary--raise it *sua sponte*. *SEC v. Forex Asset Mgmt., LLC*, 242 F.3d 325, 328 (5th Cir.2001).

In this case, the standing issue was previously raised and disposed of in Webb I. What occurred below in the Court of Appeals in *Webb II*, however, is akin to a district court granting a summary judgment, *sua sponte*, without giving a party notice and an opportunity to be heard. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Washington v. RTC*, 68 F.3d 935, 939 (5th Cir.

1995)[before granting summary judgment *sua sponte*, the court must give the parties 10 days' notice of same to allow party to respond]. Petitioners raised this concern in their petition for rehearing, which was denied. The petition for *certiorari* should issue directing the Court of Appeals to grant the petition for rehearing in accordance with the arguments raised herein.

CONCLUSION

For these various reasons, this petition for *certiorari* should be granted, and upon full consideration, Petitioners pray that the Court vacate the decision of the United States Court of Appeals for the Fifth Circuit, and remand the case to the Circuit Court with instructions that the Court of Appeals rehear the case as requested by Petitioners, and/or that it certify the controlling issues of Texas law to the Supreme Court of Texas for decision by that Court pursuant to Rule 58 of the Texas Appellate Rules.

Respectfully submitted,
JAMES M. MURPHY
Counsel of Record
P. O. BOX 140809
DALLAS, TEXAS 75214
214-745-1532
Attorney for Petitioners

(any footnotes trail end of each document)

No. 04-10031

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ANN TENISON HEREFORD WEBB; LIZANN TENISON WEBB; BYRON JAMES WEBB; CAMILLE ELIZABETH WEBB SEWELL,
Plaintiffs-Appellants,

Versus

CITY OF DALLAS, TEXAS; CITY OF DALLAS PARKS AND RECREATION DEPARTMENT; CITY OF DALLAS PARKS AND RECREATION BOARD; PAUL DYER, DIRECTOR, CITY OF DALLAS PARKS AND RECREATION DEPARTMENT,
Defendants-Appellees.

August 17, 2005, Filed

COUNSEL: For ANN TENISON HEREFORD WEBB, LIZANN TENISON WEBB, BYRON JAMES WEBB, CAMILLE ELIZABETH WEBB SEWELL, Plaintiffs - Appellants: James M Murphy, Dallas, TX.

For CITY OF DALLAS, TEXAS, CITY OF DALLAS PARKS AND RECREATION DEPARTMENT, CITY OF DALLAS PARKS AND RECREATION BOARD, PAUL DYER, DIRECTOR, City of Dallas Parks and Recreation Department, Defendants - Appellees: James Bickford Pinson, Assistant City Attorney, City Attorney's Office for the City of Dallas, Dallas, TX.

JUDGES: Before HIGGINBOTHAM, BARKSDALE, and CLEMENT, Circuit Judges.

OPINION: PER CURIAM: *

Plaintiffs Ann Tenison Hereford Webb, Lizann Tenison Webb, Byron James Webb, and Camille Elizabeth Webb Sewell (collectively the "Webbs") appeal the district court's take-nothing judgment with respect to their claims against the City of Dallas. The Webbs asserted that the City violated a condition contained in deeds conveying property to the City which provided that the property would revert to the grantors "or their heirs" if the property ceased to be used as a public park. The Webbs alleged that they were heirs under the deeds. A jury found to the contrary, and the district court entered judgment based on this finding. We now affirm.

I

We set forth the factual background of this case at length in our prior opinion, and will not retrace it here.[1] Following remand to the district court, the case was tried to a jury. The court submitted a series of special interrogatories to the jury. Question One inquired whether the Webbs "proved that in the Tenison Deeds, the grantors, Edward O. and Annie M. Tenison, clearly intended to refer to the [Webbs] by the use of the word 'heirs'?" The court instructed the jury to answer "Plaintiffs did prove," or "Plaintiffs did not prove." In the event that the jury chose the latter answer, they were instructed to stop and answer no further questions. Following several days of deliberations, the jury answered Question One by marking "Plaintiffs did

not prove." Upon consideration of the verdict, the court entered a take-nothing judgment against the Webbs. The Webbs filed a timely notice of appeal.

II

Of the eight points of error raised by the Webbs on appeal, only one merits discussion: whether the district court erred when it submitted Question One to the jury. Specifically, the Webbs argue that the question of whether they were heirs under the deeds was not properly before the district court and, in the alternative, that this question was one of law to be resolved by the court. We address these arguments in turn.

A

The Webbs argue that the meaning of the word "heirs" as used in the deeds was not properly before the district court because (1) it was conclusively answered in our prior opinion, and (2) it is a question of state law that must be answered in a separate heirship proceeding before a state court. These arguments are without merit.

First, our prior decision did not conclusively adjudicate the question of whether the Webbs are "heirs" under the Tenison deeds. Rather, we were called upon to determine whether the Webbs claimed an interest in the property transferred by the deeds sufficient to satisfy the jurisdictional injury-in-fact requirement of Article III. Looking to the pleadings, we determined that the Webbs had averred facts adequate to meet constitutional standing requirements.[2] Importantly, we

noted that the "Webbs may ultimately fail to prove ownership or any property interest entitlement to the Tenison property."[3] It is clear from this statement and our analysis that we did not render a final ruling on the meaning of the word "heirs" as used in the deeds.

Second, the Webbs argue that it was unnecessary for the district court to determine whether they would take as heirs under the deeds; that this question should have been answered in a separate state heirship proceeding following a determination of whether the property had reverted under the deeds. Under Texas law, persons claiming to be entitled to property in a decedent's estate may initiate an heirship proceeding to determine "who are the heirs . . . and their respective shares and interests."4 Such proceedings are appropriate when a decedent dies "intestate."[5] Whether the Webbs are entitled to bring an heirship proceeding is irrelevant to the present suit, in which the Webbs seek to establish an interest in the property via the deeds. In order to ascertain whether the Webbs were entitled to take under these *inter vivos* conveyances, the district court was required to interpret the language of the deeds.

In short, we conclude that the question of whether the Webbs were "heirs" under the deeds was properly before the district court.

B

The Webbs also contend that the district court erred by submitting a purely legal question of deed construction to the jury. They claim that the unambiguous language of the deeds created an executory interest in the

property which would vest in the lineal descendants of the Tenisons alive when the deed conditions were violated. The Webbs did not object to the submission of Question One to the jury; accordingly, our review is for plain error only.[6] "For an appellant to prevail under the plain error standard, it must show 1) that an error occurred; 2) that the error was plain, which means clear or obvious; 3) the plain error must affect substantial rights; and 4) not correcting the error would seriously impact the fairness, integrity, or public reputation of judicial proceedings."[7]

Under Texas law, both the interpretation of an unambiguous deed and the determination of whether a deed is ambiguous are questions of law for the court.[8] If the court determines that a deed is ambiguous, it may submit the deed to a jury for resolution of the ambiguity.[9] The court need not make an express finding of ambiguity in order to do so; if the court submits the issue to the jury, we may presume that the court found the deed ambiguous.[10]

When seeking to determine whether a deed is ambiguous, Texas courts look to the intent of the contracting parties as expressed within the "four corners" of the document.[11] "The four corners rule requires the court to ascertain the intent of the parties solely from all of the language in the deed."[12] If the court cannot determine the intent of the parties from the plain language of the deed, the court may apply "applicable rules of construction."[13] If, after the application of the rules of construction, the language of the deed is still ambiguous, the court may admit and consider extrinsic evidence to assist it in its interpretive task.[14] "An instrument is ambiguous only

when the application of these rules leaves it unclear which of two reasonable meanings is the correct one."[15]

The deeds at issue here provide that if the property is not used by the City as a public park, the City ceases to use the property for park purposes, or the name of the park is changed, the City's title to the property shall cease, "and said property . . . shall at once revert to and vest in us [the Tenisons] or our heirs, and it shall be lawful for us or our heirs to re-enter upon, take, repossess and enjoy all and singular the property hereby granted as in our former estate." Looking to the deed as a whole, it is apparent that the Tenisons sought by this language to grant to the City a fee simple interest in the land subject to a condition subsequent that the City maintain the property as a public park.[16] This property interest was passed from the Tenisons to their surviving children by operation of the residuary clauses of their wills. Importantly, these wills did not transfer the right of reentry to the Webbs' ancestor who predeceased the Tenisons.

In addition to the creation of a right of re-entry, the Webbs urge that the deeds conveyed to the "heirs" an executory interest in the property. Under this theory, the word "heirs" in the deeds refers to all lineal descendants of the Tenisons living at the time the deed conditions were violated. This conveyance is impermissible as it contravenes the rule against perpetuities, which provides that "no interest is valid unless it must vest, if at all, within twentyone years after the death of some life or lives in being at the time of the creation of the interest."[17] When the deeds were executed, the City could have maintained the land as a public park for an indefinite period of time. Thus, it was

possible at the time the deeds were made that the lineal descendants of the Tenisons alive when the City ceased using the property as a public park would not be determined until well after the perpetuities period ended. Under Texas law, if a deed is equally open to two constructions, "effect will be given to the construction which renders the agreement valid rather than void."[18] Thus, the Webbs' proffered interpretation of the deed must be rejected. Further, no alternative interpretation of the deeds that would vest rights in the Webbs is available.

Because the word "heirs" in the deeds cannot, as a matter of law, refer to the Webbs, the district court committed plain error by submitting Question One to the jury. However, the district court's take-nothing judgment is correct as a matter of law for this very reason. Further, to the extent that the court omitted any necessary factual issue in the jury instructions, we deem the court to have made such a finding in accord with the judgment.[19] Accordingly, we conclude that the district court's submission of Question One to the jury, while erroneous, did not affect the Webbs' substantial rights.[20]

III

For the foregoing reasons, the judgment of the district court is AFFIRMED.

Footnotes

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published

and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

n1 *See Webb v. City of Dallas*, 314 F.3d 787, 788-90 (5th Cir. 2002).

n2 *See Meadowbriar Home for Children, Inc. v. Gunn*, 81 F.3d 521, 529 (5th Cir. 1996) ("'At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embace those specific facts that are necessary to support the claim.'" (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992)); *Cramer v. Skinner*, 931 F.2d 1020, 1025 (5th Cir. 1991) ("When a court considers standing on a motion for a 12(b) dismissal, it must accept the allegations in the pleadings as true."); *see also Barrett Computer Servs., Inc. v. PDA, Inc.*, 884 F.2d 214, 219 (5th Cir. 1989) ("In cases in which the merits of the claims asserted are intertwined with the jurisdictional issue of standing, challenges to standing are frequently resolved in summary judgment proceedings . . . *or at a trial on the merits.*" (emphasis added)).

n3 *Webb*, 314 F.3d at 791.

n4 TEX. PROP. CODE ANN. § 48(a) (Vernon 2003); *see* TEX. PROB. CODE ANN. § 49(a) (Vernon 2003); TEX. PROB. CODE ANN. § 54 (Vernon 2003).

n5 TEX. PROB. CODE ANN. § 48(a).

n6 *See Septimus v. Univ. of Houston*, 399 F.3d 601, 606-07 (5th Cir. 2005).

n7 *Id.* at 607.

n8 *See Dell Computer Corp. v. Rodriguez*, 390 F.3d 377, 384 (5th Cir. 2004); *Propulsion Techs., Inc. v. Attwood Corp.*, 369 F.3d 896, 900 (5th Cir. 2004); *Temple-Inland Forest Prods. Corp. v. United States*, 988 F.2d 1418, 1421 (5th Cir. 1993).

n9 *See Exxon Corp. v. W. Tex. Gathering Co.*, 868 S.W.2d 299, 302, 36 Tex. Sup. Ct. J. 1206 (Tex. 1993).

n10 *Id.* ("While the trial court here never made an express finding that the contract was ambiguous, such a determination was necessary to its submission of a jury question inquiring into the [interpretation of the contract].").

n11 *Cherokee Water Co. v. Freeman*, 33 S.W.3d 349, 353 (Tex. App.--Texarkana 2000, no pet.) (citing *Luckel v. White*, 819 S.W.2d 459, 461, 35 Tex. Sup. Ct. J. 40 (Tex. 1991)).

n12 *Id.* (citing *Concord Oil Co. v. Pennzoil Exploration & Prod. Co.*, 966 S.W.2d 451, 465, 41 Tex. Sup. Ct. J. 476 (Tex. 1998)).

n13 *Id.*

n14 *Id.* (citing *Stauffer v. Henderson*, 801 S.W.2d 858, 863, 34 Tex. Sup. Ct. J. 221 (Tex. 1990)).

n15 *Id.*

n16 *See Lawyers Trust Co. v. City of Houston*, 359 S.W.2d 887, 890, 5 Tex. Sup. Ct. J. 543 (Tex. 1962)

(holding that nearly identical language in a conveyance created a fee simple subject to a condition subsequent).

n17 *Hamman v. Bright & Co.*, 924 S.W.2d 168, 171 (Tex. App.-Amarillo 1996), *vacated pursuant to settlement*, 938 S.W.2d 718 (Tex. 1997) (citing *Peveto v. Starkey*, 645 S.W.2d 770, 772, 26 Tex. Sup. Ct. J. 106 (Tex. 1982); *Foshee v. Republic Nat'l Bank*, 617 S. W. 2d 675, 677, 24 Tex. Sup. Ct. J. 252 (Tex. 1981)).

n18 *Conquistador Petroleum, Inc. v. Chatham*, 899 S.W.2d 439, 442 (Tex. App.- Eastland 1995, *writ denied*) (citing Kelly v. Womack, 153 Tex. 371, 268 S.W.2d 903, 906 (Tex. 1954)).

n19 FED. R. CIV. P. 49(a)

n20 *See Hobart Bros. Co. v. Malcolm T. Gilliland, Inc.*, 471 F.2d 894, 905 (5th Cir. 1973) (applying harmless error analysis to errors in a jury charge in a civil case).

Filed 11/10/05

No. 04-10031

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ANN TENISON HEREFORD WEBB; LIZANN TENISON WEBB; BYRON JAMES WEBB; CAMILLE ELIZABETH WEBB SEWELL,
Plaintiffs-Appellants,

Versus

CITY OF DALLAS, TEXAS; CITY OF DALLAS PARKS AND RECREATION DEPARTMENT; CITY OF DALLAS PARKS AND RECREATION BOARD; PAUL DYER, DIRECTOR, CITY OF DALLAS PARKS AND RECREATION DEPARTMENT,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS

Before HIGGINBOTHAM, BARKSDALE, and CLEMENT, Circuit Judges.

IT IS ORDERED that the petition for rehearing is *denied*

ENTERED FOR THE COURT:
s/
United States Circuit Judge

CA 3:00-CV-2558-R
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ANN TENISON HEREFORD WEBB, LIZANN TENISON WEBB, BYRON JAMES WEBB, AND CAMILLE ELIZABETH WEBB SEWELL,
Plaintiffs,

v.

THE CITY OF DALLAS, TEXAS, THE CITY OF DALLAS PARKS & RECREATION DEPARTMENT, TB CITY OF DALLAS PARKS AND RECREATION BOARD, and PAUL DYER, DIRECTOR, CITY OF DALLAS PARKS & RECREATION DEPARTMENT,
Defendants.

COURT'S INSTRUCTIONS TO THE JURY

These instructions contain the law that applies to this case. You must follow them in reaching your verdict.

General Instructions

Consider these instructions as a whole. Do not single out any portion. Do not disregard any instruction.

As jurors, your duty is to determine the facts, without prejudice or sympathy. In doing so, consider only the evidence admitted during trial. Do not speculate about matters that are not in evidence. However, you are permitted to draw reasonable, common sense inferences from the testimony and exhibits.

Statements and arguments of the lawyers are not evidence. Also, you must disregard anything I may have done which might lead you to believe that I have some opinion about the facts of this case, because I do not.

Evidence is either "direct" or "circumstantial." "Direct evidence" is testimony by someone claiming actual knowledge of a fact, such as an eyewitness. "Circumstantial evidence" is proof of a chain of circumstances that points to the existence or nonexistence of certain facts. There is no distinction between the weight to be given to either type of evidence; the law requires only that you consider all of the evidence. However, this does not mean that you must accept all of the evidence.

Credibility Impeachment, Weight of the Evidence

You are the sole judges of the credibility or "believability" of each witness and the weight to be given to the testimony. In weighing credibility, consider all of the circumstances surrounding the testimony: Did the witness have any particular reason not to tell the truth? Did he or she have some personal interest in the outcome of the case? What was the witness's relationship to the plaintiff or the defendant? Did the witness seem to have a good memory? Did he or she appear to understand the questions and answer them directly? Did the witness have the opportunity and ability to observe accurately the things that he or she testified about? Was the witness impeached because the testimony was inconsistent with something that the witness had said or done earlier? Was the

witness's testimony supported, or contradicted, by other evidence?

In other words, you may accept all of the testimony of a witness; you may accept only part of it; or you may reject the witness's testimony entirely. But in reaching your verdict, do not make any decision simply because there may have been more witnesses on one side than on the other. Your duty is to decide whether you believe what each witness had to say and how important that testimony was.

Burden of Proof

The plaintiffs have the burden of proving every essential element of its claims by a preponderance of the evidence. The defendants have the burden of proving any affirmative defense by a preponderance of the evidence. "Preponderance of the evidence" means such evidence, when considered and compared with that opposed to it, is more convincing and produces in your minds the belief that what is sought to be proved is more likely true than not true. In other words, to establish a claim by a "preponderance of the evidence" merely means to prove that the claim is more likely so than not so.

The Tenison Deed

Both parties agree that on March 3, 1923, Edward 0. and Annie M. Tenison deeded 78.8 acres of real estate to the City of Dallas in memory of their son, Edward Hugh Tenison. On March 29, 1923, Mr. and Mrs. Tenison deeded an additional 26 acres of real estate to the City of Dallas, also in memory of their son, Edward

Hugh Tenison (the "Tenison Deeds"). The Tenisons had four children, and both Edward 0. and Annie M. died with valid wills. The Plaintiffs in this case are descendants of Edward Hugh Tenison and the great-granddaughter and great-great-grandchildren of Edward 0. and Annie M. Tenison. The terms of the Tenison Deeds conditionally granted the land to the City of Dallas;

But this conveyance is made for the purposes of a public park only, and upon the express condition that the property shall always be used by the City of Dallas, for the purposes of a public park for the use and enjoyment of the people of the City of Dallas, and for such purposes exclusively. Said park shall be known and designated for all time as "Tenison Park." And if said property, or any part thereof, shall not be used for the purposes or a Public Park, or if said property, or any part thereof, shall be used for any purpose other than public park purposes as above provided for, or should the name of said park be changed from the above designated, then in each such event the right and title of the City of Dallas to the property hereby granted shall cease, and said property and all right and title thereto shall at once revert to and vest in us or our heirs, and it shall be lawful for us or our heirs to re-enter upon, take, repossess and enjoy all and singular the property hereby granted as in our former estate.

Contentions of the Parties

Ann Tenison Hereford Webb, Lizann Tenison Webb, Byron James Webb, and Camille Elizabeth Webb Sewell (the "Plaintiffs") assert claims against the City of Dallas, the City of Dallas Parks and Recreation

Department, the City of Dallas Parks and Recreation Board, and Paul Dyer, the Director of the City of Dallas Parks and Recreation Department (the "Defendants"). Plaintiffs claim that, with respect to the Tenison Park West Golf Course, the Defendants currently are using land donated by Edward 0. and Annie M. Tenison for a purpose contrary to that intended and articulated in the deed donating the property to the City of Dallas. Plaintiffs further claim that Defendants have breached a condition in the Tenison Deeds by changing the name of the property from "Tenison Park" to "Tenison Highlands." Plaintiffs contend that because the Defendants have violated the conditions of the original deeds by (1) no longer using the property deeded to the City of Dallas for the purposes of a public park and (2) changing the name to one other than that required in the deeds. Plaintiffs claim that as heirs, they have the right to re-enter upon, take, repossess and enjoy the property.

Defendants contend that the current use of the land granted in the Tenison Deeds meets the deeds' requirement of using the land for the purposes of a public park as intended by Edward 0. and Annie M. Tenison. The Defendants respond to the Plaintiffs' allegations by claiming that Plaintiffs are not "heirs" of the Tenison estate and therefore cannot enforce the restrictions in the deeds. The Defendants also assert two affirmative defenses to Plaintiffs claims: (1) that Mr. and Mrs. Tenison approved the use of the donated property as a golf course, and fees for use of the golf course were charged to the public during Mr. and/or Mrs. Tenison's lifetime, and (2) that Plaintiffs' suit is barred under the ten-year statute of limitations for adverse possession.

QUESTION 1

Did Plaintiffs Ann Tenison Hereford Webb, Lizann Tenison Webb, Byron James Webb, and Camille Elizabeth Webb Sewell prove that in the Tenison Deeds, the grantors, Edward D. and Annie M. Tenison, clearly intended to refer to the Plaintiffs by the use of the word "heirs"?

Answer "Plaintiffs did prove" or "Plaintiffs did not prove."

Answer: *"Plaintiffs did not prove."*

If your answer to question I is "Plaintiffs did not prove," then stop here. If your answer is "Plaintiffs did prove," then proceed to question 2.

Instructions for Question 1

The term "heirs" refers to "that class of persons who by inheritance take in succession from generation to generation." The term is also defined in Section 38(a)(1) of the Texas Probate Code as "those persons . . . who are entitled under the statutes of descent and distribution to the estate of a decedent who dies intestate." A person dies intestate when they have not left a valid will. "Heirs" has also been used to refer to "children," if the context of the document and the surrounding circumstances clearly indicate that such usage was intended.

QUESTION 2

Did Plaintiffs prove that, based on the 1999 renovation of the Tenison West Golf Course, the City of Dallas has ceased to use the Tenison grant property for the purposes intended by the grantors, Edward 0. and Annie M. Tenison, when they donated the property "for the purposes of a public park for the use and enjoyment of the people of the City of Dallas, and for such purposes exclusively"?

Answer "Plaintiffs did prove" or "Plaintiffs did not prove."

Answer:

Proceed to question 3.

Instructions for Question 2

A municipal park is a place where the public generally may go for various kinds of recreation and amusement. A "park" may include facilities for a vast array of recreational activities, including tennis, pitching horse shoes, croquet, baseball, basketball, golf, walking, horseback riding, picnicking, and general outdoor exercise. The Tenison Deeds require that the property be used "for purposes of a public park," not "as a park." Park purposes are not confined to a tract of land with trees, grass, and seats. Park purposes include a tract of land ornamented and improved as a place of resort for the public, for recreation and amusement of the public, and also include almost any use of the property that would reasonably and probably contribute to the enjoyment of the remainder of the donated area or of adjacent properties by members of the public.

QUESTION 3

Did the Plaintiffs prove that, based on the name of the golf course as "Tenison Highlands," the City of Dallas has changed the name of the donated land from that designated by Edward O. and Annie M. Tenison?

Answer "Plaintiffs did prove" or "Plaintiffs did not prove."

Answer:

If you answered "Plaintiffs did not prove" to questions 2 and 3, then do not answer Questions 4 and 5. If you answered "Plaintiffs did prove" to question 2 or question 3 or both, then answer question 4.

QUESTION 4

Did the Defendants prove that, during their lifetimes, Edward D. and/or Annie M. Tenison approved the use of the property granted in the Tenison Deeds for a golf course, where fees were charged for the use of the golf course facilities?

Answer "Defendants did prove" or "Defendants did not prove."

Answer:

Proceed to question 5.

QUESTION 5

Did the Defendants prove that the 1999 renovation of the Tenison West Golf Course did not substantially change the use of the Tenison grant property from its use for more than 10 years prior to the renovation?

Answer "Defendants did prove" or "Defendants did not prove."

Answer:

Instructions on Deliberation

It is now time for you to deliberate. Begin by selecting one juror to preside over your discussions. If you need to ask me a question, send me a written note signed by the Presiding Juror. After talking to the lawyers, I will answer your question either in writing or here in the courtroom. However, do not tell me where you stand on your verdict - for instance, if you are split 6-6 or 9-3, do not put that in your note.

Your verdict must be unanimous; that is, all of you must agree to each answer. When you have done this, the Presiding Juror should complete the verdict form and then advise me that you have reached a verdict.

Each of you must decide this case for yourself, but only after discussing the evidence with the other jurors. Do not hesitate to change your mind during deliberations if you are wrong. But do not give up your honest beliefs just because others may think differently, or just to get through with the case.

And remember at all times that you are now the judges - judges of the facts. Your sole interest is to seek the truth from the evidence in this case.

SIGNED: October 15 2003.
JUDGE JERRY BUCHMEYER
SENIOR U.S. DISTRICT JUDGE
NORTHERN DISTRICT OF TEXAS

VERDICT OF THE JURY

We, the jury, have answered the question in this case in the manner stated in this verdict form, and we return this answer to the Court as our verdict.

SIGNED: October 15, 2003

JUDGE JERRY BUCHMEYER
SENIOR U.S. DISTRICT JUDGE
NORTHERN DISTRICT OF TEXAS

Filed 10/17/2005

CA 3:00-CV-2558-R
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ANN TENISON HEREFORD WEBB, ET AL
Plaintiffs,

v.

THE CITY OF DALLAS, ET AL
Defendants.

ORDER

After making the review required by 28 U.S.C. Sec. 636(b), the Court finds that the findings, conclusions and recommendation of Magistrate Judge Feff Kaplan, filed October 4, 2001, are correct ,and they are adopted as the findings and conclusions of the Court.

IT IS SO ORDERED,

ENTERED: October 17, 2001

s/
JUDGE JERRY BUCHMEYER
SENIOR U.S. DISTRICT JUDGE
NORTHERN DISTRICT OF TEXAS

No. 01-11398

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ANN TENISON HEREFORD WEBB; LIZANN TENISON WEBB; BYRON JAMES WEBB; CAMILLE ELIZABETH WEBB SEWELL,
Plaintiffs - Appellees

v.

CITY OF DALLAS, TEXAS; CITY OF DALLAS PARKS AND RECREATION DEPARTMENT; CITY OF DALLAS PARKS & RECREATION BOARD; PAUL DYER, Director, City of Dallas Parks & Recreation Department,
Defendants - Appellants

December 16, 2002, Decided

December 16, 2002, Filed

COUNSEL: For ANN TENSION WEBB, LIZANN TENION WEBB, BYRON JAMES WEBB, CAMILLE ELIZABETH WEBB SEWELL, Plaintiffs - Appellees: James M Murphy, Law Offices of James M Murphy, Dallas, TX.

For CITY 0F DALLAS TEXAS, CITY OF DALLAS PARKS AND RECREATION DEPARTMENT, CITY OF DALLAS PARKS & RECREATION BOARD, PAUL DYER, Defendants - Appellants: James Bickford Pinson, City Attorney's Office, Dallas, TX.

JUDGES: Before KING, Chief Judge, and JOLLY and HIGGINBOTHAM, Circuit Judges.

OPINION BY: KING

OPINION: KING, Chief Judge:

This interlocutory appeal requires us to decide whether, as the district court held, Defendants are immune from suit based on Texas's doctrine of sovereign immunity. Resolution of this question requires us to first decide whether the Plaintiffs have constitutional standing to sue. Because we agree that Plaintiffs have asserted a claim in this controversy sufficient to satisfy Article III's minimum constitutional standing requirements and that state sovereign immunity from suit does not bar Plaintiffs' claims against Defendants, we affirm the order of the district court to the extent that it denied Defendants' sovereign immunity from suit.

I. FACTS AND PROCEDURAL BACKGROUND

A. The Parties Involved and Legal Instruments at Issue

This case involves a dispute regarding deed restrictions on property donated to the City of Dallas. Edward O. and Annie M. Tenison ("the Tenisons") had four children. Their son, Edward Hugh Tenison, predeceased his parents. Edward Hugh Tenison was survived by two children, Elizabeth Ann Tenison and Edward Hugh Tenison, Jr. Elizabeth Ann Tenison was the grandmother of Plaintiff-Appellee Ann Tenison Hereford Webb and the great-grandmother of

Plaintiffs-Appellees Lizann Tenison Webb, Byron James Webb and Camille Elizabeth Webb Sewell (together, the "Webbs"). Hence, the Webbs are the great-grandchildren and great-great-grandchildren of the Tenisons.

On December 12, 1922, Edward O. Tenison executed his will, in which he bequeathed $ 25,000 to each of his three living children: Mrs. Cruger T. Smith, Mrs. Dan M. Craddock and Mr. James C. Tenison. The will also created separate trusts in the amount of $ 25,000 for each of his three grandchildren, including Elizabeth Ann Tenison. Edward O. Tenison left the "rest, residue, and remainder" of his estate to his wife, Annie M. Tenison. At the time he executed the will, the Tenisons owned the land that is the subject of the current dispute.

On March 23, 1923, the Tenisons deeded 78.8 acres of real estate located between East Grand Avenue and East Pike Road to the City of Dallas in memory of their son, Edward Hugh Tenison. The deed included the following restriction,

But this conveyance is made for the purposes of a public park only, and upon the express condition that the property shall always be used by the City of Dallas, for the purposes of a public park for the use and enjoyment of the people of the City of Dallas, and for such purposes exclusively. Said park shall be known and designated for all time as "Tenison Park." And if said property, or any part thereof, shall not be used for the purposes of a Public Park, or if said property, or any part thereof, shall be used for any purpose other than public park purposes as above provided for, or

should the name of said park be changed from the above designated, then and in each such event the right and title of the City of Dallas to the property hereby granted shall cease, and said property and all right and title thereto shall at once revert to and vest in us or our heirs, and it shall be lawful for us or our heirs to re-enter upon, take, repossess and enjoy all and singular the property hereby granted as in our former estate.

On March 29, 1923, the Tenisons donated a second tract of land to the City of Dallas under the same terms and conditions as the first conveyance.

Edward O. Tenison died in 1924. On October 5, 1925, Annie M. Tenison executed a will, providing that,

[The] rest, residue and remainder of the property of which I may die seized or possessed, or to which I may be entitled at the time of my death, whether real, personal or mixed, and wheresoever situated, I give, devise and bequeath to my beloved children, Mrs. Cruger T. Smith, Mrs. Dan M. Craddock, and James Charles Tenison.

Annie M. Tenison died in 1927.

B. The Current Dispute

As the grantee under the deeds, the City of Dallas operated two municipal golf courses on the property known as Tenison Park. In 1998, the Dallas City Council approved a plan to redesign the Tenison Park West Course, and the renovated golf course was opened for business in October 2000. The Webbs allege that rising green fees effectively excluded certain citizens from the use and enjoyment of the property and that

the name of the property was also changed from "Tenison Park" to "Tenison Highlands."

On November 22, 2000, the Webbs filed suit in federal court against the City of Dallas, its Parks and Recreation Department and Parks and Recreation Board and Park Director Paul Dyer, in his official capacity (together the "City"). In general, the Webbs claimed that the City "took said property and have not used and expressed intention not to use the property for purposes of a public park." More specifically, in their First Amended Complaint, the Webbs sought a reverter of the property to them as heirs of the Tenisons, a declaration that they have the right to immediately reenter upon and take possession of the property, damages for breach of the Dallas City Charter and Texas trust law and an accounting of all profits realized by the City's activities from November 1999 through the date of final judgment in this case. The Webbs further generally claimed, without particularizing the specific relief sought, relief under a state trespass to try title cause of action.

The Webbs moved for partial summary judgment on their claims for declaratory relief, trespass to try title and right of reverter. The City moved for summary judgment on the basis that the Webbs are not legally entitled to enforce restrictions in the deeds and moved for judgment on the pleadings on the basis that the doctrine of sovereign immunity precludes the Webbs from bringing suit against the City.

C. The District Court Decision

On October 4, 2001, the United States Magistrate

Judge recommended that the district court deny all pending motions in this case. By order dated October 17, 2001, the district court adopted the "Findings and Recommendation of the United States Magistrate Judge," effectively denying the City's motion for summary judgment and for judgment on the pleadings.

The City appeals the district court's order denying its motion.

II. STANDARD OF REVIEW

This court reviews de novo the denial of a summary judgment motion based on standing.[1] This court also reviews de novo the denial of a motion for judgment on the pleadings based on state sovereign immunity.[2] In adjudicating a motion for judgment on the pleadings, the court may look only to the pleadings and must accept all facts pleaded therein as true.[3]

III. ARTICLE III STANDING AND STATE SOVEREIGN IMMUNITY

The issues before the court on appeal are (1) whether the Webbs claim an interest in the property sufficient to satisfy the jurisdictional injury-in-fact requirement of Article III, and (2) whether, even if Article III standing is found, the City is nevertheless immune from suit under the doctrine of sovereign immunity. Regarding the City's argument that the Webbs lack a legal interest to sue as "heirs" under the deeds, the district court specifically determined that genuine issues of material fact exist as to whether the Webbs are legal "heirs" of the Tenisons, as that term is used in the relevant deeds. Regarding the City's argument that

Texas's sovereign immunity doctrine immunizes it from the present suit, the district court concluded that the City waived immunity from both suit and liability. On appeal, the City contends that the Webbs have not satisfied the injury-in-fact requirement for this court to have Article III jurisdiction and that it has not waived immunity from suit such that subject matter jurisdiction to entertain the merits of the Webbs' claims is present.

A. Standing under Article III

Initially, we must conclude that we have jurisdiction under Article III of the United States Constitution before proceeding to the merits of the City's claim of sovereign immunity from suit.[4] In response to the City's motion for summary judgment that the Webbs do not possess a right to enforce the deed restrictions as "heirs" when the residuary clause in Annie M. Tenison's will left the "rest, residue and remainder" of her property to her three children, the district court found that "genuine issues of material fact as to whether plaintiffs are the 'heirs' of Edward O. and Annie M. Tenison, as that term is used in the Tenison deeds," precluded summary judgment. On appeal, we are not called upon to review the merits of the district court's summary judgment determination regarding the Webbs' alleged ownership rights. Rather, in order to review the discrete sovereign immunity question on appeal, we must only determine that the minimum constitutional requirements for standing are satisfied.[5]

The Webbs are not direct descendants of the named beneficiaries of the residuary clause of Annie M. Tenison's will. Moreover, neither of the Tenison wills

specifically references the future interest created by the Tenison Park conveyances to the City. Nevertheless, in their First Amended Complaint, the Webbs have undoubtedly asserted an interest in this property dispute sufficient to satisfy the injury-in-fact jurisdictional requirement of the Article III standing doctrine.

Standing to sue is the "core of Article III's case-or-controversy requirement, and the party invoking federal jurisdiction bears the burden of establishing its existence."[6] To invoke federal jurisdiction, the Webbs are required to allege facts demonstrating that they have suffered an injury-in-fact -- an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.[7] This requirement is part of the "irreducible constitutional minimum" required to establish Article III standing.[8]

Here, the Webbs have asserted a "personal stake" in the dispute that is concrete and particularized.[9] As alleged, the conduct of the City in violating the deed restrictions has affected the Webbs in a personal, individual and particularized way because as "heirs" under the deeds, they have a personal stake in seeing that the City adheres to the restrictions on the use of the Tenison property.[10]

The Webbs may ultimately fail to prove ownership or any property interest entitlement to the Tenison property. Facially, however, the First Amended Complaint (including its reference to the express language of the relevant deeds) avers that the Webbs suffered a concrete constitutional injury-in-fact by the

City's failure to operate the Tenison property in accordance with the deed restrictions and that through the express conveyance of a fee simple subject to a condition subsequent, the Webbs can now redress this injury by exercising their right of reentry as "heirs."[11] These allegations assert an interest in the property dispute sufficient to meet the minimum constitutional requirements of Article III.

B. Sovereign Immunity

Having dispensed with the question whether the Webbs have constitutional standing to pursue their claims, we now turn to the question whether the City has waived immunity from suit.

In answering a question where, as here, jurisdiction is based on diversity of citizenship, we have a duty to apply the forum state's jurisprudence.[12] Further, where, as here, we are asked to resolve a sovereign immunity question in a diversity of citizenship case, we must defer to the sovereign immunity law of the forum state.[13]

Under Texas law, immunity from liability and immunity from suit are two distinct principles.[14] Immunity from liability protects the State from a judgment against it even if the State legislature has expressly consented to suit; in contrast, immunity from suit bars an action against the State unless the State expressly consents to suit.[15] The City concedes that it waived immunity from liability by accepting the deed-restricted conveyance of land from the Tenisons. It thus only asserts immunity from suit, not liability. We note at the outset that under Texas law, a suit

against a municipality or its agencies arising out of the performance of its governmental duties or to recover for alleged breach of a contract is deemed to be a suit against the State of Texas for purposes of state sovereign immunity unless some special exception applies.[16] The Webbs principally aver that immunity from suit has been expressly waived by statute and by express provisions of the Dallas City Charter and, alternatively, that immunity from suit has been waived by the City's conduct in accepting the deed-restricted conveyances here. The City disagrees with both arguments.

Before turning to the question of waiver of immunity from suit under Texas law, however, we briefly address the Webbs' initial contention that the doctrine of sovereign immunity does not even apply to the instant lawsuit because this is an action in rem to recover title to and possession of land.

1. In Rem Proceeding

The Webbs essentially contend that sovereign immunity does not bar this proceeding because they are simply seeking a declaration of what already belongs to them. It is true that an entity or person whose rights have been violated by the unlawful action of a state official may bring suit against that state official, individually, to remedy the violation or prevent its occurrence and that such a suit is not a suit against the State requiring statutory authorization because the conduct of the agent or official is unauthorized and thus "ultra vires."[17] However, the claims raised by the Webbs do not fall within this narrow class of claims excepted from the general rule requiring statutory

authorization to maintain a suit against the State.[18] The Webbs have not sued officials in their individual capacities, and the Texas Supreme Court has clearly held that suits against the State or its agencies for title to land or suits against the State or its agencies seeking injunctive relief to enforce contractual rights are necessarily suits against the State requiring legislative authorization to sue.19 Further, we note that in addition to injunctive and declaratory relief, the Webbs also seek legal relief in the form of an accounting and money damages for the City's alleged breach of the covenants and of the Dallas City Charter. Thus, their in rem distinction is misplaced.[20]

2. Express Waiver of Sovereign Immunity

The Webbs persuaded the district court that the City had expressly waived its immunity from suit. The Texas Local Government Code states that home-rule municipalities, such as the City of Dallas, "may plead and be impleaded in any court."[21] Further, the Dallas City Charter states that the City of Dallas shall have the power "to sue and be sued."[22] The Dallas City Charter provision does not restrict the forum for suits against the City to courts of the State.[23] The district court relied on these two provisions to find an express waiver of sovereign immunity from suit here. The City argues this conclusion is in error, contending that the code and charter provisions relied on by the district court are simply confirmations that the City of Dallas has the corporate capacity to sue and be sued. Alternatively, buttressing its argument with four state decisions from Texas courts of appeals, it seeks to have this court certify the express waiver issue to the Texas Supreme Court as an "unsettled" question of state law.

In Missouri Pacific Railroad Co. v. Brownsville Navigation District,[24] the Texas Supreme Court held that a statute with language similar to that found in § 51.075 and the Dallas City Charter provision waived immunity from suit. The statute in that case states that,

All navigation districts . . . may sue or be sued in all courts of this state in the name of such navigation district, and all courts of this state shall take judicial notice of the establishment of all districts.[25]

The Texas Supreme Court stated that this language "quite plainly" "gives general consent for District to be sued in the courts of Texas" such that immunity from suit is expressly waived.[26]

More recently, in Travis County v. Pelzel & Assoc.,[27] the Texas Supreme Court again addressed whether a statute "clearly and unambiguously" waives the State's immunity from suit. Section 89.004(a),entitled "Presentation of Claim," provides that "[a] person may not sue on a claim against a county unless the person has presented the claim to the commissioners court and the commissioners court has neglected or refused to pay all or part of the claim."[28] The court held that this language did not waive Travis County's immunity from suit because the statute did not state clearly and unambiguously that Travis County could be sued. Rather, the court found that the provision just as easily could simply create a condition precedent to suit.[29] Important to this conclusion was the finding that the original statutory language providing that the county may "sue and be sued" was deleted in 1879 to leave text "largely resembling the current statute" in place.[30] As stated by the Texas Supreme Court, "well over a

hundred years ago, the Legislature deleted the only language arguably waiving sovereign immunity, suggesting that it intended to preserve counties' immunity from suit."[31] In so concluding, the court discussed Missouri Pacific in some detail. However, it did not overrule its prior holding. Instead, the Pelzel court distinguished the less-than-clear legislative expression of waiver in the "Presentation of Claim" statute from the "sue and be sued" language applicable to navigation districts found by the Missouri Pacific court to "quite plainly" waive immunity from suit.[32]

As stated, the City asserts that four Texas courts of appeals have held that similar "sue and be sued" provisions do not waive the State's immunity from suit.[33] While this is an accurate statement of Texas law, it is a well-settled principle that in diversity cases, we "seek guidance by looking to the precedents established by intermediate state appellate courts" only when the state supreme court has not spoken on an issue or there has been some intervening change in the law that requires us to make an Erie guess regarding how the Texas Supreme Court would most likely decide an issue.[34] Here, the Texas Supreme Court has addressed the question we are called upon to now answer, and the state appellate court decisions cited by the City do not persuade us to veer from this precedent. The cases cited by the City, for the most part, either follow pre-Missouri Pacific law or completely fail to mention Missouri Pacific.[35] Moreover, as argued by the Webbs, the City's argument that the "sue and be sued" provision is just a recognition of its corporate capacity to sue and be sued is also belied by the fact that the vast majority of state courts of appeals to address the express legislative waiver question in the context of

similar "sue and be sued" clauses follow Missouri Pacific as controlling Texas Supreme Court precedent.[36]

We find controlling Texas Supreme Court authority for the district court's holding that the City has expressly waived its immunity from suit in this case and see no need to certify the question of express waiver to the Texas Supreme Court.[37] Express legislation provides that the City may be sued. As a home-rule municipality, the City may exempt itself from suit. It has not done so here.

As its resolution is not essential to our holding, we do not address the Webbs' final argument that the City waived its right to assert immunity from suit by "accepting the benefits of the gifts, subject to the terms and conditions thereof."

IV. CONCLUSION

Plaintiffs have asserted a claim in this controversy sufficient to satisfy the jurisdictional requirements of Article III. Further, sovereign immunity from suit does not bar Plaintiffs' suit against the City of Dallas. We AFFIRM the district court's order insofar as it denied the City sovereign immunity from suit.

Footnotes

n1 Ass'n of Cmty. Orgs. for Reform Now v. Fowler, 178 F.3d 350, 356 (5th Cir. 1999).

n2 PYCA Indus., Inc. v. Harrison County Waste Water Mgmt. Dist., 81 F.3d 1412, 1417-20 (5th Cir. 1996).

n3 St. Paul Fire & Marine Ins. Co. v. Convalescent Serv., Inc., 193 F.3d 340, 342 (5th Cir. 1999).

n4 See Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 93-94, 140 L. Ed. 2d 210, 118 S. Ct. 1003 (1998); Calderon v. Ashmus, 523 U.S. 740, 745, 140 L. Ed. 2d 970, 118 S. Ct. 1694 & n.2, 523 U.S. 740, 140 L. Ed. 2d 970, 118 S. Ct. 1694 (1998); House the Homeless, Inc. v. Widnall, 94 F.3d 176, 179 n.7 (5th Cir. 1996).

n5 Coopers & Lybrand v. Livesay, 437 U.S. 463, 468, 57 L. Ed. 2d 351, 98 S. Ct. 2454 (1978) (discussing the Cohen doctrine and the limited jurisdiction of an appellate court to review "an important issue completely separate from the merits of the action.").

n6 523 U.S. at 103-04.

n7 Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992); Gore, Inc. v. Espy, 87 F.3d 767, 771 (5th Cir. 1996).

n8 Riley v. St. Luke's Episcopal Hosp., 196 F.3d 514, 532 (5th Cir. 1999).

n9 Raines v. Byrd, 521 U.S. 811, 818, 138 L. Ed. 2d 849, 117 S. Ct. 2312 (1997).

n10 Id.

n11 See Lawyers Trust Co. v. City of Houston, 359 S.W.2d 887, 890, 5 Tex. Sup. Ct. J. 543 (Tex. 1962) (discussing the characterization of a fee simple determinable and a fee simple subject to a condition

subsequent); Gutierrez v. Rodriguez, 30 S.W.3d 558, 560 (Tex. App. - Texarkana 2000, no pet.).

n12 Erie R. Co. v. Tompkins, 304 U.S. 64, 79-80, 82 L. Ed. 1188, 58 S. Ct. 817 (1938).

n13 Tompkins v. El Paso, 449 F.2d 842, 844 (5th Cir. 1971).

n14 Federal Sign v. Texas S. Univ., 951 S.W.2d 401, 405, 40 Tex. Sup. Ct. J. 676.

n15 Id.

n16 See Federal Sign v. Tex. S. Univ., 951 S.W.2d 401, 408, 40 Tex. Sup. Ct. J. 676 (Tex. 1997); Gates v. City of Dallas, 704 S.W.2d 737, 738, 29 Tex. Sup. Ct. J. 200 (Tex. 1986); Cranford v. City of Pasadena, 917 S.W.2d 484, 487 (Tex. App. - Houston [14th Dist.] 1996, no writ); Avmanco, Inc. v. City of Grand Prairie, 835 S.W.2d 160, 165 (Tex. App. - Fort Worth 1992, writ dism'd as moot).

n17 See, e.g., Tex. Highway Comm'n v. Tex. Assoc. of Steel Importers, Inc., 372 S.W.2d 525, 530 (Tex. 1963) (concluding that legislative consent was not required to bring a declaratory judgment suit against the Highway Commission); Cobb v. Harrington, 144 Tex. 360, 190 S.W.2d 709, 712 (Tex. 1945) (holding that legislative consent was not required for a declaratory judgment suit against the State Comptroller to determine the constitutionality of a tax statute).

n18 See, e.g., Tex. Natural Resource Conservation Comm'n v. IT - Davy, 74 S.W.3d 849, 861 (Tex. 2002)

(making clear that a plaintiff cannot circumvent the doctrine of sovereign immunity by seeking declaratory relief that essentially resolves a breach of contract issue); Federal Sign v. Tex. S. Univ., 951 S.W.2d 401, 408, 40 Tex. Sup. Ct. J. 676 (Tex. 1997) (holding that a suit seeking injunctive relief to enforce contractual rights is necessarily a suit against the State that cannot be maintained without legislative permission); State v. Lain, 162 Tex. 549, 349 S.W.2d 579, 582, 4 Tex. Sup. Ct. J. 594 (Tex. 1961) (concluding that a suit for title to land against the State or its agency cannot be maintained without legislative consent); Herring v. Houston Nat'l Exchange Bank, 113 Tex. 264, 253 S.W. 813, 814 (Tex. 1923) (stating that a suit against state officers to require them to perform a contract by the State or to establish the validity of a contract by the State is a suit against the State itself); Tex. Parks & Wildlife Dept. v. W.M. Callaway, 971 S.W.2d 145, 152 (Tex. App. - Austin 1998, no writ) (holding that "although [plaintiff's] request for declaratory relief is not premised expressly on breach of contract," legislative consent is still required because, in essence, the plaintiff is seeking a declaration of his rights under the easement and an order enforcing those rights).

n19 IT - Davy, 74 S.W.3d at 861; Federal Sign, 951 S.W.2d at 408; Lain, 349 S.W.2d at 582.

n20 See, e.g., Federal Sign, 951 S.W.2d at 404-05 (claimants seeking both equitable and legal relief were required to secure legislative consent to sue the state agency).

n21 Section 51.075 of the Texas Local Government Code, entitled "Authority Relating to Lawsuits," states

that "the municipality may plead and be impleaded in any court." TEX. LOCAL GOV'T CODE Ann. § 51.075 (Vernon 1999).

n22 Section 1(2) of Chapter II, entitled "Powers of the City," of the Dallas City Charter provides, in relevant part, that,

The City of Dallas, as such body politic and corporate, shall have perpetual succession and shall have the following powers:

(1) to use a corporate seal;

(2) to sue and be sued;

(3) to plead and be impleaded in all courts;

(4) to institute and prosecute suits without giving security therefore, and to appeal from judgments of the courts . . . .

Dallas, Tex., Charter ch. II, § 1(2) (1999).

n23 Id.

n24 453 S.W.2d 812, 13 Tex. Sup. Ct. J. 308 (Tex. 1970).

n25 Id. at 813 (emphasis added).

n26 Id.

n27 77 S.W.3d 246, 45 Tex. Sup. Ct. J. 623 (Tex. 2002).

n28 TEX. LOCAL GOV'T CODE ANN. § 89.004(a) (Vernon 1999).

n29 Pelzel, 77 S.W.3d at 250.

n30 77 S.W.3d at 249-50.

n31 77 S.W.3d at 250.

n32 Id.

n33 See, e.g., City of Dallas v. Reata Constr. Corp., 83 S.W.3d 392, 398 (Tex. App. - Dallas 2002, no pet.); Jackson v. City of Galveston, 837 S.W.2d 868, 871 (Tex. App. - Houston [14th Dist.] 1992, writ denied); Townsend v. Memorial Med. Ctr., 529 S.W.2d 264, 267 (Tex. Civ. App. - Corpus Christi 1975, writ ref'd n.r.e.); Childs v. Greenville Hosp. Auth., 479 S.W.2d 399, 401 (Tex. Civ. App. - Texarkana 1972, writ ref'd n.r.e.).

n34 Howe v. Scottsdale Ins. Co., 204 F.3d 624, 628 (5th Cir. 2000); see also Herrmann Herrmann Holdings Ltd. v. Lucent Techs. Inc., 302 F.3d 552, 558 (5th Cir. 2002) ("In deciding this case, we are required to make an Erie guess as to what the Texas Supreme Court would most likely decide.")

n35 See, e.g., Reata Constr. Corp., 83 S.W.3d at 398 (following Jackson (discussed infra) without citing to Missouri Pacific, to find the "sue and be sued" provision "simply speaks to the City's capacity to sue and its capacity to be sued when immunity has been waived.") (emphasis in original); Jackson, 837 S.W.2d at 871 (simply following Townsend (discussed infra) without analysis); Townsend, 529 S.W.2d at 267 (relying solely on Childs (discussed infra), which, in turn, relied solely

on cases decided before Missouri Pacific, to hold that a hospital district is immune from suit despite a "sue and be sued" statutory provision); Childs, 479 S.W.2d at 401 (relying on pre-Missouri Pacific cases to find, without discussion, no waiver of immunity from suit).

n36 See, e.g., Tarrant Dunty Hosp. Dist. v. Henry, 52 S.W.3d 434, 448 (Tex. App. - Fort Worth 2001, no pet.) ("It is well settled that this type of [sue and be sued] statutory provision is a consent to suit, resulting in waiver of immunity from suit."); Alamo Comm. Coll. Dist. v. Obayashi Corp., 980 S.W.2d 745, 748 (Tex. App. - San Antonio 1998, pet. denied) (stating that "by subjecting junior college districts [] to the same general law applicable to independent school districts [through a provision that states the district can sue and be sued], it appears to us, clearly and unambiguously, the Texas Legislature granted its consent to sue junior college community districts and we so hold."); Engelman Irrigations Dist. v. Shields Bros., Inc., 960 S.W.2d 343, 347 (Tex. App. - Corpus Christi 1997) (finding that the irrigation district was not entitled to immunity from suit because of a "sue and be sued" clause), pet. denied per curiam, 989 S.W.2d 360 (Tex. 1998); Knowles v. City of Granbury, 953 S.W.2d 19, 23 (Tex. App. - Fort Worth 1997, pet. denied) ("As a home-rule municipality, Granbury may sue and be sued. Had it wanted to exempt itself from liability, it could have . . . Because the Local Government Code and Granbury's charter provide that the city may be sued, its immunity from suit is [] waived."); Avmanco, Inc. v. City of Grand Prairie, 835 S.W.2d 160, 165 (Tex. App. - Fort Worth 1992, writ dism'd as moot) ("While there is no general law waiving the State's immunity from suit where liability is sought because of breach of contract, the

City is liable here because both the State and the City have enacted legislation providing their respective consents to suits against the City. Furthermore, the city charter of Grand Prairie itself provides that the City may sue and be sued."); Dillard v. Austin Indep. Sch. Dist., 806 S.W.2d 589, 593 & n.3 (Tex. App. - Austin 1991, writ denied) (concluding that through a "sue and be sued" provision, the Texas Legislature gave its consent for an independent school district to be sued).

n37 See Vaught v. Showa Denko K.K., 107 F.3d 1137, 1142 (5th Cir. 1997) (holding that certification "is appropriate only if it appears to the certifying court that there is no controlling precedent in the decisions of the Supreme Court of Texas") (internal quotation omitted).

Filed 10/4/2001
CA 3:00-CV-2558-R
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ANN TENISON HEREFORD WEBB, LIZANN TENISON WEBB, BYRON JAMES WEBB, AND CAMILLE ELIZABETH WEBB SEWELL,
Plaintiffs,

v.

THE CITY OF DALLAS, TEXAS, THE CITY OF DALLAS PARKS & RECREATION DEPARTMENT, TB CITY OF DALLAS PARKS AND RECREATION BOARD, and PAUL DYER, DIRECTOR, CITY OF DALLAS PARKS & RECREATION DEPARTMENT,
Defendants

FINDINGS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

This case is before the Court on: (1) defendants' motion for summary judgment or, alternatively, for judgment on the pleadings; and (2) plaintiffs' motion for partial summary judgment. For the reasons stated herein, both motions should be denied.[1]

I.

Plaintiffs Ann Tenison Hereford Webb, Lizann Tenison Webb, Byron James Webb, and Camille Elizabeth Webb Sewell are the great-grandchildren and great-

great-grandchildren of Edward O. Tenison and Annie M. Tenison. (Plf. First Am. Compl. 11). On March 3, 1923, the Tenisons deeded 78.8 acres of real estate located between East Grand Avenue and East Pike Road to the City of Dallas in memory of their son, Edward Hugh Tenison. (Id. Par. 14). The deed included the following restriction:

> But this conveyance is made for the purposes of a public park only, and upon the express condition that the property aforesaid shall always be used by the City of Dallas, for the purposes of a public park for the use and enjoyment of the people of the City of Dallas, and for such purposes exclusively. Said park shall be known and designated for all time as "Tenison Park." And if said property, or any part thereof, shall not be used by said City, or its successors as such municipal corporation, for the purposes of a Public park, or if said property, or any part thereof, shall be used for any purpose other than public park purposes as above provided for, or should the name of said park be changed from that above designated, then and in each such event the right and title of the City of Dallas to the property hereby granted shall cease, and said property and all right and title thereto shall at once revert to and vest in us or our heirs, and it shall be lawful for us or our heirs to re-enter upon, take, repossess and enjoy all and singular the property hereby granted as in our former estate.

(Id.; Def. MSJ ft. App., Exh. 9). On March 29, 1923, the Tenisons donated a second tract of land to the City

under the same terms and conditions as the first conveyance. (Plf. First Am. Compl. Par. 17; Def. MSJ Jt. App. Exh. 10).

The City of Dallas formerly operated two municipal golf courses on the property known as Tenison Park. (Plf. First Am. Compl. Par. 20). In 1998, the Dallas City Council considered a plan to redesign the Tenison Park West Course. The proposed design required the destruction of approximately 700 mature trees on the property and disrupted local wildlife habitats. (Id.). Despite protests from local groups, the plan was approved and the renovated golf course was opened for business in October 2000. (Id. Par. 25, 28). Plaintiffs allege that the primary purpose of the redesigned golf course is to attract out-of-town visitors to play golf on a "championship quality golf facility," thereby generating more revenue for a private entity that operates the course. (Id. Par. 22, 29-30). Increased green fees have effectively excluded certain citizens from use and enjoyment of the property. (Id. Pars. 25-27, 30). The name of the property also has been changed from "Tenison Park" to "Tenison Highlands." (Id. Par. 19). According to plaintiffs, "the entire area of the public park property ... has been appropriated and converted by the Defendants to the sole use of an 'upscale' golf course to the exclusion of the people of the City of Dallas who seek to enjoy the property donated by the Tenisons as a public park." (Id. Par. 30).

On November 22, 2000, plaintiffs filed suit in federal court against the City of Dallas, its Parks and Recreation Department and Parks and Recreation Board, and Park Director Paul Dyer.[2] Plaintiffs seek a reverter of the Tenison Park property and declaratory

relief because defendants "have taken said property and have not used and expressed intention not to use the property for the purpose of a public park . . . " (Id. Par. 33). They also sue for breach of covenant, violations of the Dallas City Charter, trespass to try title, and an accounting. Both sides now seek judgment as a matter of law as to certain claims and defenses. Defendants argue that this case should be dismissed because plaintiffs lack standing to enforce the Tenison deed restrictions and the City of Dallas and its departments are immune from suit. Plaintiffs move for partial summary judgment on their claims for declaratory relief, trespass to try title, and right of reverter. The issues have been fully briefed by the parties and the motions are ripe for determination.

II.

Summary judgment is proper when there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. FED. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). A movant who bears the burden of proof at trial must submit evidence to establish every essential element of his claim or affirmative defense. See Richmond Capital Corp. v. Federal Express Corp., 29 F.Supp.2d 737, 738 (M.D.La. 1998). A movant who does not have the burden of proof need only point to the absence of a genuine fact issue. Duffy v. Leading Edge Products, Inc., 44 F.3d 308, 312 (5th Cir. 1995). In either case, the burden then shifts to the nonmovant to show that summary judgment is not proper. Duckett v. City of Cedar Park, 950 F.2d 272, 276 (5th Cir.1992). The parties may satisfy their respective burdens by tendering depositions, affidavits,

and other competent evidence. Topalian v. Ehrman, 954 F.2d 1125, 1131 (5th Cir), cert. denied, 113 S.Ct. 82 (1992). All evidence must be viewed in the light most favorable to the party opposing the motion. Rosado v. Deters, 5 F.3d 119, 122 (5th Cir. 1993).

Like a motion for summary judgment, a motion for judgment on the pleadings provides a vehicle for the summary adjudication of a claim or defense after the pleadings are closed but before trial. FED. R. Civ. P. 12(c); Hebert Abstract Co., Inc. v. Touchstone Properties, Ltd., 914 F.2d 74, 76 (5th Cir. 1990). However, the Court may look only to the pleadings and must accept all facts pleaded therein as true. St. Paul Fire and Marine Ins. Co. v. Convalescent Services, Inc., 193 F. 3d 340, 342 (5th Cir. 1999). Judgment on the pleadings is appropriate only if the material facts are not in dispute and questions of law are all that remain. Voest Alpine Trading USA Corp. v. Rank of China, 142 F.3d 887, 891 (5th Cir.), cert. denied, 119 S.Ct. 591 (1998).

III.

Defendants contend that plaintiffs lack standing to enforce the Tenison deed restrictions because they are not the legal heirs of Edward 0. and Annie M. Tenison. Alternatively, they maintain that this suit is barred by sovereign immunity. Both arguments implicate this Court's jurisdiction and must be addressed at the outset.

A.

Defendants first contend that plaintiffs are not the "heirs" of Edward 0. and Annie M. Tenison and thus have no legal interest in the Tenison Park property. To better understand this argument, it is necessary to trace the Teñison lineage through which plaintiffs claim their right to enforce the deed restrictions.

1.

Edward O. and Annie M. Tenison had four children. Their son, Edward Hugh Tenison, predeceased his parents. Edward Hugh Tenison was survived by two children, Elizabeth Ann Tenison and Edward Hugh Tenison, Jr. Elizabeth Ann Tenison was the grandmother of Ann Tenison Hereford Webb and the great-grandmother of Lizann Tenison Webb, Camille Elizabeth Webb Sewell, and Byron James Webb--the four plaintiffs in this suit. (Def. MSJ Jt. App., Exh. 1).

When Edward 0. Tenison died in 1924, he bequeathed $25,000 to each of his three living children--Mrs. Cruger T. Smith, Mrs. Dan M. Craddock, and James C. Tenison. (Id., Exh. 12, Par. 111). The will also created separate trusts in the amount of $25,000 for each of his three grandchildren, including Elizabeth Ann Tension, plaintiffs' direct ancestor. (Id., Exh. 12, Par. 11). Edward left the "rest, residue and remainder" of his estate to his wife, Annie M. Tenison. (Id., Exh. 12, Par. IV). Annie died in 1927. Her will provides, in relevant part:

> Fully aware that my beloved deceased husband, Edward Oliver Tension, provided amply for our grandchildren in bequests in trust to the City National Bank, Dallas, Texas, being the sum of

$25,000.00 each, namely Edward 0. Tenison 2nd, Elizabeth Ann Tenison and Edward Hugh Tenison, I only mention them as follows:

I give, devise and bequeath to the City National Bank of Dallas, Texas, and to its corporate successor, being a national bank, the sum of $10,000.00 to be held in two separate trusts as follows, to wit:

(1) $5,000.00 of said sum in trust for the sole use and benefit of my beloved granddaughter, Elizabeth Ann Tenison;

(2) $5,000.00 of said sum for the sole use and benefit of my beloved grandson, Edward Hugh Tenison ...

***

It is my wish that a portion of my personal jewelry be distributed amongst my granddaughters, as a keepsake, but I leave the distribution of same wholly in the hands of my executres and/or executor herein appointed, as they think suitable.

All the rest, residue and remainder of the property of which I may die seized or possessed, or to which I may be entitled at the time of my death, whether real, personal or mixed, and wheresoever situated, I give, devise and bequeath to my beloved children, Mrs. Cruger T. Smith, Mrs. Dan M. Craddock and James Charles Tenison.

(Id., Exh. 2, Par. 2-4) (emphasis added). As neither of the Tenison wills specifically mentions the reversionary interest in the deeds, defendants contend that this interest passed to Mrs. Cruger T. Smith, Mrs. Dan M. Craddock, and James Charles Tenison along with the "rest, residue and remainder" of Annie M. Tenison's estate. None of the plaintiffs are direct descendants of these beneficiaries. Therefore, defendants maintain that plaintiffs are not "heirs" of the Tenison estate and cannot enforce the deed restrictions.

2.

Plaintiffs counter that the term "heirs," as used in the Tenison deeds, is not so limited. They contend that the Tenisons intended the term to include their lineal descendants so the restrictive covenants in the deeds would be enforceable for all time. Because the Tenisons intended the deeds to operate separately from their wills, plaintiffs argue that the reversionary interest did not pass through the line of testamentary succession.

This argument is supported by Texas law. At common law, the term "heirs" generally referred to "that class of persons who by inheritance take in succession from generation to generation. " Barmore v. Darragh, 231 S.W. 472, 478 (Tex. Civ. App.--San Antonio 1921), rev'd on other grounds, 242 S.W. 714 (Tex. Comm. App. 1922). The Texas Property Code defines "heirs" as "those persons ... who are entitled under the statutes of descent and distribution to the estate of a decedent who dies intestate. " TEX. PROP. CODE ANN. § 3(o) (Vernon 1980). The term has even been used to refer to "children," if the context of the document and the surrounding circumstances indicate that such usage

was intended. See Federal Land Bank of Houston v. Little, 107 S.W.2d 374, 376-77 (Tex. Comm. App. 1937); Texas Co. v. Meador, 250 S.W.148,149-50 (Tex. Comm. App. 1923). However, the Court has found no case in which term "heirs" has been used to refer to persons who take under a valid will. A person who dies leaving a will disposing of his entire estate may have devisees, legatees or assigns, but he does not have "heirs." See Buckner Orphans Home v. Berry, 332 S.W.2d 771, 775-76 (Tex. Civ. App.--Dallas 1960, writ ref' d n. r. e.) (where decedent left a valid will, appellees had no interest that would entitle them to seek a declaration of heirship without first having the will annulled). The fact that the deeds were executed three months after Edward 0. Tenison executed his will further supports plaintiffs' argument, as it suggests that the Tenisons knew they had no "heirs" in the technical sense.[3]

Defendants also challenge plaintiffs' interpretation of the deeds on a variety of other grounds. Some of these arguments simply mention various rules of construction or policy considerations against restraints on alienation. (Def. MSJ Br. at 16-17). Others invoke such arcane yet enduring principles as shifting and springing executory interests, fee simple defeasible and determinable, the Rule Against Perpetuities, the Doctrine of Worthier Title, and the Rule in Shelley's Case. (Id. at 17-19). Despite the nostalgia these arguments inspire for first-year law school, they need not be addressed in the absence of more thorough briefing by the defendants. See In re Hunt, 124 B . R. 200, 210 n.11(N . D. Tex. 1991) (Fitzwater, J.).

Defendants do make two points that are worthy of discussion. Under the law in effect when Edward 0. Tenison died in 1924 and Annie M. Tenison died in 1927:

> Whenever a person dies, leaving a lawful will, all of his estate devised or bequeathed by such will shall vest immediately in the devisees or legatees; and all of the state of such person, not devised or bequested, shall vest immediately in his heirs at law.

Tex. Rev. Civ. Stat. art. 3314, now TEX. PROS. CODE ANN. § 37 (Vernon Supp. 2001). Since none of the plaintiffs were alive when the Tenisons died, their estate could not immediately vest in them. Defendants therefore conclude that plaintiffs are not Tenison "heirs." (Def. MSJ Br. at 18 n.2). In a related argument, defendants contend that any conveyance to the "heirs" of a living person is void for uncertainty. See Fisher v. Southland Royalty Co. , 270 S.W. 2d 677, 680 (Tex. C iv. App. --Eastland 1954, writ ref'd n. r. e.); Spaulding v. Higgs, 254 S.W.2d 208, 210 (Tex. Civ. App.--Austin 1953, writ ref'd n.r.e.); Vineyard v. Heard, 167 S.W. 22, 25-26 (Tex. Civ. App.-San Antonio 1914), aff'd, 212 S.W. 489 (Tex. Comm. App. 1919).

As a general rule, a living person has no heirs. Hallmark v. PortlCooper-T. Smith Stevedoring Co., 907 S.W.2d 586, 591(Tex. App.--Corpus Christi 1995, no writ); Glenn v. Holt, 229 S.W. 684, 685 (Tex. Civ. App.--El Paso 1921, no writ). However, the rule also admits an exception:

> [U]nless a contrary intention appears, a gift in a will to the heirs of a person, whether he be the

> testator or a life tenant or another, will be construed as a gift to such heirs determined as of the time of the death of that person.
>
> The opinion declares that the general rule may yield where it appears that the testator used the word "heirs " in an [in]accurate sense, to denote a hypothetical and artificial class composed of those who would have become heirs had the ancestor lived until some future time, usually the termination of a life estate, and in such case the intention of the testator will be given effect. It is further declared that sometimes the intention of the testator is disclosed by the fact that the application of the general rule would produce a result inconsistent with some provision of the will.

Richardson v. Poe, 210 S.W.2d 568, 572-73 (Tex. Civ. App.--Fort Worth 1948, no writ) (citations omitted) (emphases added). Thus, although a living person cannot have "heirs" in the technical sense, the term also can be used in a popular sense to denote the issue of a living person. Parrish v. Mills, 106 S.W. 882, 886 (Tex. 1908); Hallmark, 907 S.W.2d at 590-91; Reilly v. Huff, 335 S.W.2d 275, 279 (Tex. Civ. App.--San Antonio 1960, no writ). The Court must look to the document as a whole to determine the grantor's intent in using the term. Parrish,106 S.W. at 886; Hallmark, 907 S.W.2d at 591-92; Reilly, 335 S.W.2d at 279.

This Court cannot say as a matter of law that the Tenisons intended to use the term "heirs" in the manner suggested by defendants. Having executed his will just three months before the conveyances at issue, Edward

O. Tenison arguably knew that he had no "heirs" in the technical sense. Moreover, the deeds themselves provide that the Tenison Park properties "shall always be used by the City of Dallas for the purposes of a public park," and purport to make the restrictive covenants enforceable against the "City or its successors." (Def. MSJ Jt. App., Exhs. 9 & 10) (emphases added). This language seems to indicate that the Tenisons intended the term "heirs" to denote a broader class of persons who could enforce the deed restrictions down through the generations. Were the Court to accept defendants' argument, only those persons who were alive when the Tenisons died would have standing to enforce the covenants. It is questionable whether the Tenisons intended such a self-defeating result.

The Court determines that there are genuine issues of material fact as to whether plaintiffs are the "heirs" of Edward D . and Annie M. Tenison, as that term is used in the Tenison deeds. Accordingly, defendants are not entitled to summary judgment.

B.

Alternatively, defendants seek judgment as a matter of law on the grounds of sovereign immunity.[4] Sovereign immunity embraces two principles--immunity from suit and immunity from liability. Federal Sign v. Texas Southern University, 951 S.W. 2d 401, 405 (Tex. 1997); Missouri Pacific Railroad Co. v. Brownsville Navigation District, 453 S.W.2d 812, 813 (Tex. 1970). A governmental entity retains immunity from suit, even where liability is not disputed, absent legislative consent to be sued. Federal Sign, 951 S.W.2d at 405;

Missouri Pacific, 453 S.W.2d at 813. By contrast, immunity from liability protects a governmental entity from liability for damages even if the legislature has expressly given consent to the suit. Federal Sign, 951 S.W.2d at 405; Missouri Pacific, 453 S. W . 2d at 813. In such cases, the question remains whether the claim is one for which the governmental entity acknowledges liability. Federal Sign, 951 S.W. 2d at 405; State v. Isbell, 127 Tex. 399, 94 S.W.2d 423, 425 (1936).

1.

Defendants argue that they are immune from suit because the activities giving rise to plaintiffs' claims are "governmental" rather than "proprietary" functions. Under Texas law:

> The governmental functions of a municipal corporation have been defined as those acts which are public in nature and performed by the municipality "as the agent of the State in furtherance of general law for the interest of the public at large." Proprietary functions are those functions performed by a city, in its discretion, primarily for the benefit of those within the corporate limits of the municipality.

Gates v. City of Dallas, 704 S.W.2d 737, 738-39 (Tex. 1986), quoting City of Crystal City v. Crystal City Country Club, 486 S . W . 2d 887, 889 (Tex. Civ. App. -- Beaumont 1972, writ ref" d n.r.e.). Whereas a city enjoys sovereign immunity from a suit arising out of its performance of governmental functions, it is subject to the same duties and liabilities as a private person in the performance of its proprietary functions. See Cranford

v. City of Pasadena, 917 S.W. 2d 484, 487 (Tex. App.--Houston [14th Dist.] 1996, no writ); Gates, 704 S.W.2d at 739.

The distinction between governmental and proprietary functions is now codified in the Texas Tort Claims Act ("TTCA"), TEX. CIV. PRAC. & REM. LODE ANN. § 101.0215 (Vernon Supp. 2401). See also Cranford, 917 S.W.2d at 487 & n.9. The classification of activities set forth in the statute applies to common law tort claims as well as to claims brought under the TTCA. Id. at 487; Mitchell v. City of Dallas, 855 S.W.2d 741, 744 (Tex. App.--Dallas 1993), aff'd, 870 S.W.2d 21 (Tex. 1994). The TTCA specifically provides that the operation of "parks and zoos" is a governmental function. TEX. Civ. PRAC. & REM. CODE ANN. § 101.0215(x)(13); cf. Mitchell, 855 S.W.2d at 744 (noting that establishment and maintenance of public parks was considered a proprietary function at common law). Relying on this statutory classification, defendants contend that they are immune from any suit challenging the use of the Tenison Park property.

This argument might be compelling had plaintiffs asserted any tort claims against defendants, but they have not. Rather, plaintiffs sue defendants for breach of covenant, trespass to try title, and other claims related to the Tenison deeds. As relief, they seeks an adjudication and declaration of their rights under the deeds. Such an action sounds in contract, not tort. See Askanase v. Maddox, 1992 WL 224588 at * 4 (Tex. App.--Dallas Sept. 10, 1992, writ denied), citing Sanderson v. Sanderson, 109 S.W.2d 744, 748 (Tex. 1937) (nature of plaintiff's claim is tested by allegations of fact in petition, not form in which they are cast); see

also Cain v. Fontana, 423 S.W.2d 134, 137 (Tex. Civ. App.--San Antonio 1967, writ ref'd n.r.e.) (noting difference between action for trespass to try title and tort action for malicious trespass). The TTCA is not applicable to contract claims. See Avmanco, Inc. v. City of Grand Prairie, 835 S.W.2d 160,165 (Tex. App.--Fort Worth 1992, writ dism'd as moot). The question in this context is simply whether sovereign immunity has been waived. See Federal Sign, 951 S.W. 2d at 408 (" [A] private citizen must have legislative consent to sue the State on a breach of contract claim.

2.

A statute or ordinance allowing a municipality to "sue or be sued" constitutes a waiver of immunity from suit. Missouri Pacific, 453 S.W.2d at 813; Avmanco, 835 S.W.2d at 165. Here, the Texas legislature has expressly provided that home-rule municipalities, such as the City of Dallas, "may plead and be impleaded in any court." TEX. LOCAL GOV'T CODE ANN. § 51.075 (Vernon 1999); see also City of Garland v. Shierk, 2000 WL 721602 at *2 (Tex. App.—Dallas Jun. 6, 2000, pet. denied). A similar provision is found in the Dallas City Code.[5] See Avmanco, 835 S.W.2d at 165 (city charter provision allowing city to "sue or be sued" waives immunity from suit).

Citing decisions from several intermediate appellate courts, defendants maintain that this language does not create a waiver of immunity but merely acknowledges a city's corporate existence. See Jackson v. City of Galveston, 837 S.W.2d 868, 871 & n.2 (Tex. App.--Houston [14th Dist.] 1992, writ denied); Townsend v. Memorial Medical Center, 529 S.W.2d 264, 267 (Tex.

Civ. App.--Corpus Christi 1975, writ ref'd n.r.e.). These decisions are contrary to Missouri Pacific, which held that a similar statute passed by the legislature waived immunity from suit.[6] See Shierk, 2000 WL 721602 at *2; Dillard v. Austin Independent School District, 806 S . W . 2d 589, 593 & n. 3 (Tex. App.--Austin 1991, writ denied). Accordingly, the Court determines that plaintiffs may maintain this action against defendants.

3.

A governmental entity neither creates nor admits liability by granting permission to be sued. See Federal Sign, 951 S.W.2d at 405. However, a municipality "is liable on contracts made for its benefit as if it were a private person." Id., citing State v. Elliott, 212 S.W. 695, 69798 (Tex. Civ. App. --Galveston 1919, writ ref'd). While there is little doubt that the City of Dallas would not be immune from liability if it breached a contract with a private party, the Tenison deeds are not contracts. Instead, they amount to gratuitous donations of land to the City, subject to certain conditions and restrictions on the use of the property. Despite this legal distinction, the Court concludes that the same reasons for waiving immunity in a breach of contract case apply with equal force here. Having accepted the property conveyed by the deeds, the City and its departments should be held accountable if plaintiffs can prove any violations of the restrictive covenants. If anything, the gratuitous nature of this transaction makes a more compelling case for waiver.

The Court concludes that defendants have waived both immunity from suit and immunity from liability.

Accordingly, their motion for judgment on the pleadings should be denied.

IV.

Plaintiffs move for partial summary judgment on their claims for declaratory relief, trespass to try title, and right of reverter. They argue that the City of Dallas no longer uses the subject property as a public park and has changed the name of the property from "Tenison Park" to "Tenison Highlands." As a result, plaintiffs maintain that all right, title, and interest in the property has reverted to them under the deeds.

A.

The Tenison deeds specify that "this conveyance is made for the purposes of a public park only, and upon the express condition that the property aforesaid shall always be used by the City of Dallas for the purposes of a public park for the use and enjoyment of the people of the City of Dallas, and for such purposes exclusively." (Def. MSJ Jt. App., Exhs. 9 & 10[7] As interpreted by Texas courts, the term "park" has a very broad meaning. Although the term once was primarily associated with open space and natural surroundings, this is no longer the case. See Lewis v. City of Fort Worth, 89 S.W.2d 975, 979 (Tex. 1936). "We now understand a municipal park to be a place where the public generally may go for various kinds of recreation and amusement." Id. at 978; see also King v. City of Dallas, 374 S.W.2d 707, 710 (Tex. Civ. App.-Dallas 1964, writ ref'd n.r.e.) ("Park purposes are not confined to a tract of land with trees, grass, and seats, but mean a tract of land ornamented and improved as a place of

resort for the public, for recreation and amusement of the public."). A park may include facilities for a vast array of recreational activities that benefit the public, including "tennis, pitching horse shoes, croquet, baseball, basketball, golf, walking, horseback riding, picknicking, and general outdoor exercise. " State v. Merrill, 334 S.W.2d 432, 434 (Tex. 1960) (emphasis added).[8] Thus, the mere fact that a substantial portion of the Tenison property has been devoted to a public golf course is not necessarily contrary to its use "for the purposes of a public park."[9]

1.

Nevertheless, plaintiffs urge that Tenison Park no longer qualifies as a public park because the golf course encompasses nearly all the donated land. They urge the Court to follow the lead of other jurisdictions and hold that a substantial portion of a public park must remain devoted to open space and that recreational improvements cannot "so circumscribe the potential use of the greater portion of the property to the detriment of the enjoyment of open space in its natural state." Supervisor of Assessments of Prince George's County v. Washington National Arena Limited Partnership, 402 A.2d 148, 153 (Md. App. 1979); see also McLauthlin v. City and County of Denver, 280 P.2d 1103, 1106 (Colo. 1955).

The Court declines this invitation. No such limitation has ever been recognized or even suggested by a Texas court. To the contrary, Texas law makes clear that open space is no longer the "dominating thought" in our concept of a public park. Lewis, 89 S.W.2d at 979. A gift of land "for public park purposes" has been found to

"permit almost any use of the property that would reasonably and probably contribute materially to the enjoyment of the remainder of the donated area or adjacent park properties by members of the public." King, 374 S.W.2d at 710. Plaintiffs are not entitled to summary judgment on this ground.

2.

Plaintiffs also point to the fact that the golf course is leased to a private corporation to support their conclusion that it is no longer a public park.[10] As authority for this argument, plaintiffs rely on Norton v. City of Gainesville, 86 S.E.2d 237 (Ga. 1955). The Norton court wrote:

> The weight of authority is that a municipal park is a public utility, and a portion thereof cannot be leased for a term of years for private gain. There appears from the authorities to be a clear distinction between property purchased by a municipal corporation and held for use by it as an entity, or in its proprietary capacity, and property purchased by the city for the public use and benefit of its citizens.
>
> The title and power of disposition of property acquired for strictly corporate purposes and held in its proprietary capacity, are different from its title to property acquired for and dedicated to the public use of its inhabitants. As to the former, the power to dispose is unquestioned, but as to the latter, in the absence of express legislative authority, it is only where the public use has been abandoned or the property has

> become unsuitable or inadequate for the purpose to which it was dedicated that the city has power to dispose of such property.

Id. at 237 (citations omitted). Whatever weight this precedent might carry in Texas, it does not support the conclusion plaintiffs wish to draw. Norton and the cases cited therein stand for the proposition that a city has no authority to lease public lands to private corporations. See id. at 237-38. Although such an act may be ultra vires, it does not follow that the land is no longer being used for public park purposes. That question rests on how the park is used, not how it is held. Summary judgment is not appropriate on this basis.

B.

Plaintiffs further contend that the name of the park has been changed to "Tenison Highlands" in violation of the deed restriction that the "park shall be known and designated for all time as 'Tenison Park.' " (Def. MSJ Jt. App., Exh. 9 & 10). However, the summary judgment evidence establishes only that the golf course is now called Tenison Highlands. (Plf. MSJ Jt.App., Exh. 9 at 7 & Exh. 19). There is a fact issue as to whether the park itself is still known as "Tenison Park. "

C.

Finally, plaintiffs move for summary judgment on their cause of action for trespass to try title. In order to prevail on this claim, plaintiffs must show title to the land sought to be recovered. Brownlee v. Sexton, 703 S. W. 2d 797, 799-800 (Tex. App.--Dallas 1986, writ ref' d n.r.e.). The Court has already found that there is a fact

issue as to whether plaintiffs are the "heirs" of Edward O. and Annie M. Tenison, as that term is used in the Tenison deeds. It should be clear from that discussion that summary judgment is not appropriate on their trespass to try title claim.

RECOMMENDATION

There are genuine issues of material fact that preclude judgment as a matter of law in favor of either party. Accordingly, defendants' motion for summary judgment or, alternatively, for judgment on the pleadings and plaintiffs' motion for partial summary judgment should be denied in their entirety.

DATED: October 4, 2001.

Footnotes

1 These case-dispositive motions have been referred to the magistrate judge for recommendation pursuant to 28 U.S.C. § 636(b)(1)(B) and a Standing Order of Reference dated February 7, 2001.

2Federal jurisdiction is proper because plaintiffs and defendants are citizens of different States and the amount in controversy exceeds $75,000, exclusive of interest and costs. (Plf. First Am. Compl. Pars. 111 & 2). See 28 U.S.C. § 1332(a).

3 Defendants object to plaintiffs' reliance on extrinsic evidence offered to show the Tenisons' intent in executing the deeds. (Def. MSJ Reply Br. at 1). This objection is contrary to well established Texas law:

> The cardinal rule for the construction of deeds is that the intention of the parties is to be ascertained and given effect, as gathered from the entire instrument, together with the surrounding circumstances, unless such intention is in conflict with some unbending canon of construction or settled rule of property, or is repugnant to the terms of the grant.

Hedick v. Lone Star Steel Co., 277 S.W.2d 925, 928 (Tex. Civ. App.--Texarkana 1955, writ ref'd n.r.e.); see also Fischer v. Reissig, 143 S.W.2d 130, 131 (Tex. Civ. App.--Austin 1940, writ ref'd) ("In construing covenants or restrictions as to the use of property, the circumstances and conditions surrounding the parties and property must be considered . . . "). However, the Court has not found it necessary to rely on the particular documents to which defendants object. Accordingly, this objection is overruled as moot.

4 The resolution of this issue is governed by Texas law. See Tompkins v. City of El Paso, 449 F.2d 842, 844 (5th Cir. 1971) (federal court sitting in diversity must resolve issue of sovereign immunity based on forum state's jurisprudence).

5 Plaintiffs represent that "[t]he Dallas City Code expressly grants and acknowledges the power to be sued." (Plf. MSJ Resp. Br. at 18). Defendants tacitly concede that the City Code contains such a provision. (Def. MSJ Reply Br. at 5). However, they argue that the "sue and be sued" provision is not an implied waiver of immunity.

6 The statute in Missouri Pacific provided:

> All navigation districts established under this Act may, by and through the navigation and canal commissioners, sue and be sued in all courts of this State in the name of such navigation district ...

Missouri Pacific, 453 S.W.2d at 813, quoting Tex. Rev. Civ. Stat. art. 8263h, § 46.

7 Plaintiffs suggest that this language restricts the use of the Tenison property "as a public park only." (Plf. MSJ Br. at 24). However, the deeds specify that "this conveyance is made for the purposes of a public park only." (Def. MSJ Jt. App., Exhs. 9 & 10) (emphasis added). Similar language has been interpreted by Texas courts to "permit almost any use of the property that would reasonably and probably contribute materially to the enjoyment of the remainder of the donated area or adjacent park properties by members of the public." King v. City of Dallas, 374 S.W.2d 707, 710 (Tex. Civ. App.--Dallas 1964, writ ref'd n.r.e.).

8 The fact that the City charges green fees is not contrary to use of land for public park purposes. "[W]e know of no authority which would prevent the charging of admission fees to shows and other things conducted in municipal parks." Lewis, 89 S.W. 2d at 978. See also Bernstein v. City of Pittsburgh, 77 A. 2d 452, 455 (Pa.1951).

9 Plaintiffs point out that the City of Dallas Development Code distinguishes by definition and permitted uses a public park and a public golf course. (Plf. MSJ Br. at 32-35). This only creates an additional

issue of fact that makes summary judgment inappropriate.

10The summary judgment evidence shows that Bob Smith Golf Shop, Inc. has filed an Assumed Name Certificate to transact business as Tenison Park Golf Course at 3501 Samuel Boulevard, Dallas, Texas. (Plf. MSJ Jt. App., Exh. 18).

CA 3:00-CV-2558-R
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ANN TENISON HEREFORD WEBB, LIZANN TENISON WEBB, BYRON JAMES WEBB, AND CAMILLE ELIZABETH WEBB SEWELL,
Plaintiffs,

v.

THE CITY OF DALLAS, TEXAS, THE CITY OF DALLAS PARKS & RECREATION DEPARTMENT, TB CITY OF DALLAS PARKS AND RECREATION BOARD, and PAUL DYER, DIRECTOR, CITY OF DALLAS PARKS & RECREATION DEPARTMENT,
Defendants

INSTRUCTIONS FOR SERVICE AND NOTICE OF RIGHT TO OBJECT

On this date the United States magistrate judge made written findings and a recommended disposition of defendants' motion to dismiss in the above styled and numbered cause. The United States district clerk shall serve a copy of these findings and recommendations on all parties by certified mail, return receipt requested. Pursuant to 28 U.S. C. § 636(b)(1), any party who desires to object to these findings and recommendations must file and serve written objections within ten (10) days after being served with a copy. A party filing objections must specifically

identify those findings and recommendations to which objections are being made. The district court need not consider frivolous, conclusory or general objections. The failure to file such written objections to these proposed findings and recommendations shall bar that party from obtaining a de novo determination by the district court. Nettles v. Wainwright, 677 F.2d 404, 410 (5th Cir. 1982). See also Thomas v. Arn, 474 U. S. 140, 150 (1985). Additionally, the failure to file written objections to proposed findings and recommendations within ten (10) days after being served with a copy shall bar the aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are accepted or adopted by the district court, except upon grounds of plain error or manifest injustice. Douglass v. United Services Automobile Ass'n, 79 F. 3d 1415, 1417 (5th Cir. 1996).

DATED: 10/4/2001.

JEFF KAPLAN
UNITED STATES MAGISTRATE JUDGE